

89-158

No. _____

Supreme Court, U.S.

FILED

JUL 19 1990

JOSEPH F. SPANIOL, JR.

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM 1990

PATRICIA M. BOURKE,
Petitioner
V.

Jeanne Schuman
William Gibbs
David Himmelman,
Respondents

PETITION FOR WRIT OF CERTIORARI
TO ISSUE TO
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
Part I of Appendix

Patricia M. Bourke
Attorney at Law
P.O. Box 415
Walnut Creek, California
94596
PH. (415) 944-4718
Attorney in Pro Per
Counsel of Record



QUESTIONS PRESENTED

Under what circumstances, if any, may a final state court judgment resulting from private tort litigation be reviewed for constitutional violations in a U.S. District Court?

May a U.S. District Court entertain a collateral attack on a final state judgment if the face of the record demonstrates multiple violation(s) of substantive and procedural due process, and each state court refused to recognize, address, or decide any of these issues even though they were timely and properly raised before them?

Can a state litigant have had a full and fair opportunity to litigate if the state courts each, in turn, refused to recognize, address, or decide genuine issues concerning egregious error which were repeatedly and timely brought to their attention?

If a judicial arbitration award was appealed and affirmed summarily under circumstances which clearly indicated the state courts had accorded the litigant neither a full or fair opportunity to litigate genuine federal issues, may a U.S. District Court assume jurisdiction?

If an arbitration decision is patently contradictory on its face, contains legal reasoning diametrically opposed to elementary law, disregards pivotal, undisputed evidence, contains multiple egregious legal errors, and is otherwise transparently erroneous, and then reached a result which demonstrably reversed liability between the parties, would such violate substantive due process?

Does an arbitration award, which gave punitive damages for communications falling squarely within the privileges established by state law, violate the civil rights of the purported judgment debtor?

Does the First Amendment protect one from liability for truthful statements made by and about private persons and regarding subjects which have no public import?

Does the First Amendment protect one from liability for defamation based on communications made in good faith to public officials and/or governmental agencies?

May an arbitrator hearing a binding judicial arbitration penalize a litigant with punitive damages for defamation if the record reveals she was without fault? May/must a U.S. District Court exercise its jurisdiction if no state court has considered the First Amendment issues raised?

May a final state court judgment be collaterally attacked in a U.S. District Court if it purports to impose substantial compensatory and punitive damages for statements protected by the First Amendment?

May/must a U.S. District Court exercise its jurisdiction if such issues were timely raised in the state courts and no state court recognized, addressed or decided the issue(s)?

Do the "notice" requirements of the Fourteenth Amendment require that a defamation action submitted to binding judicial arbitration be pleaded so as to set out, at least, the substance of each and every separate communication complained of?

Does an Arbitration award for defamation violate minimum due process when it is expressly predicated, in part, upon separate communications with different content and published to different persons than those which were pleaded and litigated?

May an arbitrator hearing a binding judicial arbitration decide issues which were unpleaded and unlitigated, but which were discerned (invented) by him after submission by use of evidence submitted by the adversary for a wholly different purpose?

May a state court impose substantial sanctions for "frivolous appeal" when the underlying judgment on its face contained multiple, egregious errors, demonstrably

exceeded the scope of the issues, and penalized what the record showed to be truthful statements? May/must a U.S. District Court exercise its jurisdiction under such circumstances, if the issue of the impropriety of the sanctions was timely raised and no state court recognized or addressed the issues?

Does the imposition of sanctions or punitive damages violate the Eighth Amendment if the same is done on a wholly arbitrary basis?

Can enforcement attempts undertaken by private parties of a constitutionally defective final state judgment give rise to an action against the judgment creditor and her counsels under 42 USC 1983 et seq?

Does 42 USC 1983 provide a federal cause of action against state plaintiffs who intentionally and maliciously use a knowing and willing state forum to deprive persons of constitutionally protected rights?

May a U.S. District Court impose sanctions under F.R.C.P. 11 in an amount double the fees and costs accounted for by the adversary?

May a U.S. District Court impose sanctions under F.R.C.P. 11 when there is case authority from the same circuit which recognized the validity of the same sort of action on highly analogous facts?

May a Circuit Court rubber stamp a dismissal of a summary civil rights action and an assessment of substantial sanctions by an unpublished decision which openly misrepresents the record, misconstrues the legal authorities, and invents new rules for state arbitrations?

May federal courts ignore a Motion to Augment the record to set out further violations of constitutional rights suffered from the joint action of state judges and the defendants while a civil rights action pends?

PARTIES

The parties defendant are shown in the caption as is the party plaintiff/petitioner. All are licensed California attorneys. The within Petitioner appears In Pro Per, as does William Gibbs whose address - is 169 14th Street, Oakland, Ca. Phone (415) 893-2270.

OPINIONS BELOW

The only decisions rendered in the within case, are fully set out in the Appendix p. 1-5

GROUND'S UNDER WHICH JURISDICTION IS INVOKED

Petitioner seeks a Writ of Certiorari directed at the U.S. Circuit Court of Appeal for the Ninth Circuit under 28 U.S.C. 1254. Said court denied rehearing by a decision filed April 20, 1990, see Appendix p. 13-14. Their underlying decision was filed Feb. 6, 1990 and is at pages 1-12 of the Appendix.

PROVISIONS, STATUTES, AND RULES RELIED UPON

Are set out in the appendix as well as are the various sections referred to. (A.p. 234-246

TABLE OF CONTENTS

STATEMENT OF THE CASE.....	1-18
INTRODUCTION - TWO WHOLLY DIFFERENT BASIC ISSUES.....	18-19
IF A STATE COURT HAD BOTH PERSONAL AND SUBJECT MATTER JURISDICTION, AND ENTERED A FINAL, CIVIL MONEY JUDGEMENT, MAY THAT JUDGMENT EVER BE THE SUBJECT OF A COLLATERAL ATTACK IN A U.S. DISTRICT COURT?.....	19-34
WHY AND HOW DID THE ERRORS IN THIS JUDGMENT AMOUNT TO A CONSTITUTIONAL DIMENSION?.....	35-36
STANDARDS SET BY U.S. SUPREME COURT.....	35-36
THE ARBITRATOR TURNED AGENCY LAW UPSIDE DOWN AND THEREBY TRANSFORMED TRUTH INTO LIES.....	36-40
THE ARBITRATOR DISREGARDED THE ESTABLISHED LAW OF PRIVILEGES.....	40-42
THE ARBITRATION AWARD ABROGATED PETITIONER'S FIRST AMENDMENT RIGHTS.....	42-46
MAY A U.S. DISTRICT COURT ENTERTAIN A COLLATERAL ATTACK ON A FINAL JUDGMENT OF A STATE COURT FOR DEFAMATION IF IT IS PREDICATED, IN PART, UPON LETTERS WHICH WERE NEVER PLEADED NOR LITIGATED?.....	46-53

MAY INDIVIDUALS BE SUE UNDER 42 U.S.C.
1983 BY REASON OF ACTS TAKEN TO ENFORCE A
CONSTITUTIONALLY DEFECTIVE STATE COURT
JUDGEMENT?..... 53-56

THE SUCCESSIVE ASSESSMENTS OF PUNITIVE
DAMAGES AND SANCTIONS AGAINST PETITIONER
CONSTITUTED PALPABLE ABUSES OF JUDICIAL
AUTHORITY..... 57-60

CONCLUSION..... 60-65

TABLE OF CONTENTS - APPENDIX

OPINIONS, DECISIONS

Page

Decision of Ninth Circuit Court of Appeals, Unpublished (2/6/90).....	1-12
Ninth Circuit Order Denying Rehearing and Denying Rehearing in Banc (4/20/90).....	13-14
U.S. District Court Order Denying Plaintiff's Motion For Temporary Restraining Order, Granting Defendant's Motion to Dismiss Pursuant to Rule 11, F.R.Civ. P., Requiring Pre-Filing Review Prior to Future Filings of Plaintiffs. (3/1/88).....	15-17
Award and Decision of Arbitrator (Judicial Arbitration, Oakland-Piedmont Municipal Court) (6/24/85).....	18-40
Opinion of Alameda County Appellate Panel Justifying the Grant of Sanctions for "Frivolous Appeal" (2/19/87).....	41-48
Decision of the Court of Appeal of the State of California, First Appellate District, Division Five, Unpublished, (5/30/89).....	49-51

SUMMARY ORDERS AND DENIALS:

Municipal Court Order Referring Case to Binding Arbitration per Stipulation of Parties. (11/5/84).....	52
Municipal Court Order Denying Motion to Vacate Arbitration Award. (11/7/85).....	53
Municipal Court Order Denying Reconsideration/Renewal of Motion To Vacate Arbitration Award (12/8/85)...	54

Superior Court Appellate Panel Affirmation of Municipal Court Denial, Citation for Order to Show Cause Re Sanctions for "Frivilous Appeal" (8/25/86).....	55
Superior Court Appellate Panel's Denial of Rehearing and Certification to District Court of Appeal (9/25/86).....	56
California District Court of Appeal, Denial of Petition for Certiorari. (re Arbitrator's Judgment) (10/29/86).....	57
California Supreme Court, Order Denying Review (12/17/86).....	58
Superior Court Appellate Panel's Denial of Reconsideration of Award of Sanctions (4/6/87).....	59
California District Court of Appeal, Denial of Petition for Certiorari (re sanctions) (5/8/87).....	60
Supreme Court of the United States, Denial of Petition for Writ Certiorari, (6/1/87).....	61

MISCELLANEOUS DOCUMENTS/PLEADINGS/ORDERS: (Chronological Order)

Amended Cross-Complaint for Defamation with Petitioner's Letters Appended filed in Municipal Court by Respondent, (6/22/84).....	62-113
Declaration of Cross-Defendant in Support of Petition to Vacate Arbitration Award (7/23/85).....	114-132
Transcript (partial) of Oral Proceedings Before Municipal Court, Motion to Vacate Arbitration Award, Federal Issue First Raised (11/7/85).....	133-134

Superior Court Appellate Panel's Order To Show Cause Re Contempt, Authorizing Contempt Notice To Be Mailed to Petitioner (9/4/87)..... 135-136

Complaint filed in U.S. District Court for Declaratory Relief & Damages, 42 U.S.C 1983, 1985, 1988 (10/7/87)..... 137-156

Superior Court (Alameda County) Appellate Panel's Denial of Continuance of Contempt Proceeding, Issuance of Bench Warrant for \$50,000.00 Bail, Cash Only. (1/11/88)..... 157-158

Petitioner's Declaration in Support of Merits of Motion for Injunctive Relief, filed U.S. District Court. (1/12/88). 159-177

Respondent's Declaration in Support of Motion to Strike and or Dismiss and For Sanctions and for an Injunction. (1/20/88)..... 178-189

Transcript (partial) of Oral Proceedings Before U.S. District Court. (2/25/88)..... 190-197

Transcript (partial) of Examination of Judgment Debtor (Petitioner) in Oakland Municipal Court, Judge Refuses to Permit Invocation of Fifth Amendment, Evi. Code 940, and Sentences Petitioner to 5 Days in Jail for Contempt. (5/20/88)..... 198-215

Transcript (partial) of Oral Proceedings Re Writ Taken to Superior Court Re Refusal Of Municipal Court to Permit Invocation of Fifth Amendment, and Re Judgment Void on Its Face. (6/29/88)..... 216-221

Order from Ninth Circuit Denying Summary Reversal, and Admonishing Petitioner Re Frivolous Appeal. (7/8/88)..... 222

Petitioner's Motion to Ninth Circuit to Augment Record to Show Further Violations of Constitutional Rights Through Collection

Proceedings Instituted After Stay Denied by U.S. District Court. (10/6/88)....	223-225
Ninth Circuit Referring Motion to Augment To Panel to Hear Appeal. (10/24/88)..	226
Petitioner's Submission of Additional Cases to Ninth Circuit. (12/7/89)....	227-231
Ninth Circuit Order Indicating Intent to Refuse to Permit Oral Argument. (4/19/89).....	232
Ninth Circuit Order Limiting Oral Argument. (12/5/89).....	233
42 U.S.C. 1963, et seq.	234-235
28 U.S.C. 1343.....	236
U.S. Const. Amendment VIII, XIV.....	237
F.R.C.P Rule 60	238
Cal. Civil Proc. 1141.23, 1286.2.....	239
Cal. Civil Proc. 284-285.....	240
Cal. Civil Proc. 3336.....	240
Calif. Rules of Professional Conduct, 2-100, 4-100.....	241
Cal. Civil Code 47.....	242
Cal. Civil Proc. 340.....	242
Cal. Civil Proc. 1013-1016.....	243
Calif. Constitution Art. I.....	244
Rules for Judicial Arbitrations Sec. 1613.....	245
California Penal Code 1270 + 1275....	246

TABLE OF CASE AUTHORITIES CITED .

CASE NAME	PAGE
<u>Allen v. McCurry</u> (1980) 449 U.S. 90, 101 S. Ct. 411, 66 L. ED. 308.....	23
<u>Armstrong Cork v. Lyons</u> (8th Cir., 1966) 366 F. 2d 206.....	47
<u>Asay v. Hallmark Cards, Inc.</u> (8th Cir. 1979) 594 F. 2d 692.....	48
<u>Associate Press v. Walker</u> (1967) 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094.....	42
<u>Atlas Floor Covering v. Crescent House & Garden</u> (1959) 166 CA 2d 211.....	52
<u>Baar v. Smith</u> (1927) 201 C. 87.....	47
<u>Bagley v. Iowa Beef Processors</u> (8th Cir., 1986) 797 F. 2d 632.....	44
<u>Bird v. Huber</u> (1918) 179 C. 245.....	49
<u>Brophy v. Industrial Accident Commission</u> 46 CA 2d 278.....	56
<u>Capital Bond & Investment v. Hood</u> (1933) 218 C. 729, 24 P. 2d 765.....	46
<u>Ciaffoni v. Supreme Court of Pennsylvania</u> (D. C. Pa. 1982) 550 F. Supp. 1246.....	55
<u>City of Los Angeles v. City of San Fernando</u> (1975) 14 C. 3d 199.....	34

CASE NAME	PAGE
<u>Crosby v. Broadstreet</u> (2nd Cir., 1963) 312 F. 2d 483.....	45
<u>Comprehensive Merchandising Catalogues, Inc. v. Madison</u> (7th Cir., 1975) 521 F. 2d 1210.....	46
<u>Curtis Publishing Co. v. Ruth</u> (1967) 388 U.S. 130, 87 S. CT. 1975.....	42
<u>Del Ricco v. Photochart</u> (1954) 124 CA 2d 301, 268 P. 2d 814.....	53
<u>Demorest v. City Bank Farmers' Trust</u> (1944) 321 U.S. 384, 64 S. Ct. 397, 88 L. Ed. 497.....	35
<u>Dennis v. Sparks</u> (1980) 449 U.S. 24 101 S. Ct. 183.....	54
<u>Dist. Court of Columbia Court of Appeals v. Feldman</u> 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206....	20,24, 25,28,34
<u>Fleet v. Tichenor</u> (1909) 156 CA 343.....	48
<u>Franco v. County of Marin</u> 579 F. Supp. 1032.....	27
<u>Gertz v. Robert Welch, Inc.</u> (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789.....	42
<u>Gilmer v. City of Cleveland</u> (D.C. Ohio, 1985) 617 F. Supp. 985...	59
<u>Graham v. Richardson</u> (1971), 403 U.S. 366, 91 S. Ct. 1848 29 L. Ed. 2d 408.....	41

CASE	PAGE
<u>Greenfield v. Mather</u> (1948) 32 C. 23, 194 P. 2d 1.....	34
<u>Haddad v. McDowell</u> (1931) 213 C. 690 3 P. 2d 550.....	48
<u>Hagendorf v. Brown</u> (9th Cir., 1983) 669 F. 2d 478.....	41
<u>Haring v. Prosise</u> (1983) 462 U.S. 304, 103 S. Ct. 2368, 76 L. Ed. 3d 595.....	22
<u>Hayashi v. Lorenz</u> (1954) 42 C. 2d 848, 271 P. 2d 181.....	53
<u>Heuer v. Basin Park Hotel and Resort</u> (W.D. Ark., 1953) 114 F. Supp. 604...	48, 50
<u>Hirsch v. Ensign</u> (1981) 122 CA 3d 521, 176 Cal Rptr 17.....	2
<u>Holliday v. Great Atlantic and Pacific Tea Co.</u> (8th Cir., 1958) 256 F. 2d 297.....	48
<u>Hunter v. Superior Court</u> (1939) 39 CA 2d 100.....	33
<u>Jennings v. Ward</u> (1931) 114 CA 536, 300 P. 129.....	32
<u>Johnson v. Duffy</u> (9th Cir. 1978) 588 F. 2d 740.....	56
<u>J. P. Jorgenson Co. v. Rapp</u> (9th Cir., 1907) 157 F. 732.....	47
<u>J. R. Norton v. Agricultural Labor Relations Board</u> (1987) 192 CA 3d 874, 238 Cal Rptr 87.....	51

<u>Kremer v. Chemical Construction Corp.</u> (1982) 456 U.S. 61, 102 S. Ct. 1883, 72 L. Ed. 2d 262.....	52
<u>Lebbos v. State Bar</u> (1985) 165 CA 3d 656.....	41, 43
<u>Louis Stores v. Department of Alcoholic Beverage Control</u> (1962) 57 C. 2d 749.....	34
<u>Lugar v. Edmonson Oil</u> (1982) 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482.....	54
<u>Manufacturers Record Publishing Co. v. Lauer</u> (1959) 268 F. 2d 187.....	18, 46
<u>Matheus v. De Castro</u> (1976) 429 U.S. 181, 97 S. Ct. 431, 50 L. Ed. 2d 389.....	36
<u>Matheus v. Eldrige</u> (1976) 424 U.S. 349, 96 S. Ct. 893.....	29
<u>McDonald v. Smith</u> (1985) 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384....	43, 44
<u>Migra v. Warren City School District Board of Education</u> (1984) 465 U.S. 75, 104 S. Ct. 892, 79 L. Ed. 2d 56.....	23
<u>Miofsky v. Superior Court</u> (1983) 703 F. 2d 332.....	20, 42
<u>Mitchum v. Foster</u> (1972) 407 U.S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705.....	20, 55

CASE- NAME	PAGE
<u>Montana v. United States</u> (1979) 440 U.S. 147, 99 S. Ct. 970, 59 L. Ed. 2d 210.....	22
<u>Nongard v. Burlington County Bridge Commission</u> (D.C.N.J. 1955) 133 F.S. 238.....	46
<u>O'Neil v. Northern Colorado Irrigation Co.</u> (1916) 242 U.S. 20, 37 S. Ct. 7, 61 L. Ed. 123.....	36
<u>Otworth v. So. Pacific Transportation</u> (1985) 166 CA 3d 452, 212 Cal Rptr 743.....	57
<u>Perini v. Perini</u> (1964) 225 CA 2d 399, 37 Cal Rptr 354.....	46
<u>Pioneer Land Co. v. Maddox</u> (1895) 109 C. 633.....	53
<u>Pollack v. Lytle</u> (1981) 120 CA 931, 175 Cal Rptr 81.....	39
<u>Reynolds v. Stockton</u> (1891) 140 U.S. 252, 11 S. Ct. 773, 35 L. Ed. 464.....	47
<u>Reynolds v. Georgia</u> (1981) 640 F. 2d 702.....	27
<u>Ritchie v. Sayers</u> (Cir. U.Va.1900) 100 F. 528.....	46
<u>Roberts v. City of New York</u> (1935) 295 U.S. 264, 55 S. Ct. 689, 79 L. Ed. 1429.....	35, 36, 58
<u>Robinson v. Ariyoshi</u> (1977) 441 F. Supp. 559.....	25

CASE NAME	PAGE
<u>Robinson v. Ariyoshi</u> (1985) 753	
F. 2d 1468,	25, 26, 27, 28, 29, 58
<u>Rooker v. Fidelity Trust Company</u> (1923) 263 U.S. 414, 44 S. Ct. 149, 68 L.Ed. 362.....	19. 20
<u>Scheiner v. City of New York</u> (E.D.N.Y. 1985) 611 F. Supp. 172.....	54
<u>Shapiro v. Thompson</u> (1969) 394 U.S. 618, 89 S. Ct. 1322.....	41
<u>Sotomura v. County of Hawaii</u> (1978) 460 F. Supp. 473.....	25
<u>Standard Oil Co. v. Missouri</u> (1911) 224 U.S. 270, 34 S. Ct. 406, 56 L. Ed. 760.....	47
<u>Sunshine Mining Co. v. United Steeluorkers of America</u> (9th Cir., 1987) 823 F. 2d 1289.....	50 51 59
<u>Sylvan Beach v. Koch</u> (8th Cir, 1944) 140 F. 2d 852.....	47
<u>Textile Bank Co., Inc. v. Rentschler</u> (1981) 657 F. 2d 844.....	46
<u>Title Guarantee and Trust Co. v. Monson</u> (1938) 11 C. 2d 621.....	53
<u>Tower v. Clover</u> 467 (1984) U.S. 914, 104 S. Ct. 282, 81 L. Ed. 758.....	54
<u>Traugher v. Beauchane</u> (1985) 760 F. 2d 673.....	20
<u>U.S. General, Inc. v. Schroeder</u> (E.D. Wisc. 1975) 400 F. Supp. 713...	54

CASE NAME	PAGE
<u>U.T.A. Inc. v. Airco, Inc.</u> (10th Cir., 1979) 597 F. 2d 220.....	52
<u>White v. Arthur</u> (1881) 59 C. 33..	52
<u>William B. Logan v. Monogram Precision Industries, Inc.</u> (1960) 186 CA 2d 200 8 Cal Rptr 789.....	52
<u>Williams v. Gorton</u> (9th Cir. 1976) 529 F. 2d 668.....	48
<u>Williams v. Taylor</u> (1982) 129 CA 3d 745, 181 Cal Rptr 423.....	41
<u>Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City</u> (1986) 473 U.S. 172, 105 S. Ct. 3108.....	25
<u>Wood v. Orange County</u> (11th Cir., 1983) 715 F. 2d 1543.....	27, 39, 58
<u>Worldwide Church of God v. McNair</u> (9th Cir., 1986) 805 F. 2d 888.....	28, 59

CALIFORNIA CODES, STATUTES:

Cal. Civ. Proc. Sec. 284, 285...	5
Cal. Civ. Proc. Sec. 340(3)....	11, 50
Cal. Civ. Proc. Sec. 1016.....	32
Cal. Civ. Proc. Sec. 1141.23.....	51
Cal. Civ. Proc. Sec. 1286.2.....	11, 49
Cal. Civ. Code 47 (2) (3).....	9
Cal. Civ. Code 3336.....	4
California Rules of Professional Conduct 2-100.....	4, 39
California Rules of Professional Conduct 4-100.....	7, 39
Cal. Penal Code Sec. 1270, 1275...	56
Cal. Const. Art 1, Sec. 12.....	56
Cal. Rules of Court 1613.....	50

FEDERAL CODES, RULES

42 U.S.C.A. 1983.....	20, 26 42, 54
28 U.S.C.A. 2283.....	20
F.R.C.P. Rule 11.....	17, 57
F.R.C.P. Rule 60.....	45

STATEMENT OF THE CASE

The underlying dispute involved Petitioner's complaint against her former law office associate (hereinafter called "Schuman") for interference with advantageous relations and conversion. Schuman then cross-complained against Petitioner for defamation, intentional infliction of emotional distress, and other small disputes not pertinent herein. Both Petitioner and Schuman are licensed California attorneys. The aforesaid Complaint and Cross-Complaint were referred by stipulation to binding judicial arbitration by Oakland-Piedmont Municipal Court. (A. 19, 28, 29, 52)

The federal issues herein involved have their source in the Arbitrator's sizeable money award to Schuman for "defamation" and "intentional infliction of emotional distress" arising from certain letters written by Petitioner. The lengthy, written decision produced by the Arbitrator attempting to justify his large award against

Petitioner on these causes of action, reveals on its face that the Arbitrator grossly exceeded the scope of the pleadings, violated Petitioner's First Amendment rights, was patently contradictory on its face, and so grossly and arbitrarily misconstrued whole bodies of elementary California law that he actually reversed liability between the parties.

The basic circumstances surrounding the underlying litigation involve no substantial *1 factual dispute. Schuman made a referral to Petitioner of two Social Security claimants when she was employed full time by Petitioner. Petitioner, in turn, assigned Schuman to service their cases. Schuman procured each to sign a written retainer agreement which named Petitioner as their

*1 Since there is no formal record made at a judicial arbitration, what occurred at the hearing was set out by Petitioner in a sworn declaration pursuant to Hirsch v. Ensign (1981) 122 CA 3d 521, 176 Cal Rptr 17, Schuman filed no declaration or otherwise refuted Petitioner's declaration, so Petitioner's statements form the record of the Arbitration proceeding. (A. p. 114-132)

sole attorney, insured her of the right to retain a duplicate file, and authorized her to retain an associate counsel to assist. (A.p.20-22,114-116, 125, 163)

During the course of the servicing of the claims, Petitioner paid all overhead, advanced costs, and paid Schuman's wages for servicing them pursuant to written pay vouchers periodically submitted by Schuman. By the Spring of 1981 Schuman completed all the legal services for both clients under the foregoing terms and circumstances, and submitted a form to Social Security asking for the fees whereon she designated herself as having acted as Petitioner's associate. (A. p. 22-23, 26, 116, 117, 165)

Later, but before Social Security had transmitted any of the fees, a dispute arose between Schuman and Petitioner. Subsequent to completing the cases in issue, Schuman had undertaken to sub-let office space from Petitioner, but did not pay rent nor certain minor amounts Petitioner claimed due.

Nevertheless, Schuman demanded payment in full of her last pay voucher, with no off-set for the sums Petitioner claimed. When Petitioner would not agree, Schuman threatened Petitioner that she would take the Social Security fees! In furtherance of this threatened embezzlement, Schuman thereupon stole both clients case files from Petitioner's secretary's desk, and continued to refuse to return them even when Petitioner called the police. Schuman was thereupon terminated by Petitioner. (A. p. 23-25, 118, 120, 165, 166)

Thereafter Schuman contacted both clients regarding this dispute without Petitioner's knowledge or consent, an act directly contrary to the provisions of California Rules of Professional Conduct 2-100. Schuman thereupon induced each of these unsophisticated clients to sign a statement indicating that she, and not Petitioner had been their attorney, and accordingly she was the one entitled to the (full) fees and case files!! Since there was

at no time any Substitution of Attorneys involved (Cal. Code. Civ. Proc. 284-285), Schuman was, in effect, thereby inducing breach of contract, and committing fraud on the clients. When she then sent these statements to Social Security to induce them to divert both the fees to herself, she was defrauding both Social Security and her former employer. (A. p. 118, 119, 126, 127, 166, 168)

In order to try to protect herself from Schuman's misappropriation of fees owed her, Petitioner wrote letters to each client. Firstly she informed them that Schuman was no longer involved and tried to explain Schuman's true status as a mere employee. Petitioner also tried to enlist their help to prevent the theft of the fees, and to gain temporary access to the case files to make copies (per the contract). Petitioner also sought to explain simple agency principles to the clients. She also requested authorization from them so as to induce Social Security to send her copies of

pertinent papers. These papers were to have been used in the litigation Petitioner planned to file against Schuman. However, having been apparently totally alienated by Schuman, neither client responded and both refused to cooperate in any way. (A. p. 27, 73, 84-113, 127, 128, 168,

In response to Petitioner's letters written to Social Security, initially it claimed everything was "confidential" and that Petitioner needed the authorization of either Schuman or the clients to assist her!!?? Petitioner thereupon wrote to her congressman for assistance and also reported Schuman's unethical conduct to the State Bar. (A. p. 25, 130)

Weeks later, Schuman transmitted a personal check purporting to be Petitioner's share of the first Social Security fee check. However she had deducted and retained for herself the full amount of her last pay voucher, making no allowance for any rent or other sums Petitioner had claimed. When

Petitioner initially attempted to negotiate Schuman's personal check, it was dishonored by reason of insufficient funds. Hence, Schuman had not only co-mingled these funds contrary to the provisions of Cal. Rules of Professional Conduct 4-100, but she had also been using even the part of the money she deigned to allocate to her former employer!! (A. p. 26, 119-120, 167)

In the meantime, Schuman wrote to Petitioner warning her not to be contacting "her clients", and informing her that she intended to treat the next fee check in the same way! (A. p. 120, 129, 167)

Months later, Schuman transmitted another check supposedly representing the fee from the second case, but placed a restricted endorsement on the reverse (the nature of the restriction being in dispute). Petitioner returned the check to Schuman and on or about May 27, 1982 instituted the Municipal Court action against her as aforesaid. The clients were also named in the suit due to their

breach of contract, and as means of facilitating return of the files which were still in Schuman's possession, and regarding which they were each now asserting "attorney/client privilege".(A.p. 32, 119, 120, 167)

Significantly, Schuman also expressly claimed a right to a normal "referral fee" in her Cross-Complaint. Her claims of "defamation" and "emotional distress" were specifically predicted upon 8 letters Petitioner had written to the clients and to Schuman's new employer regarding the dispute. Schuman specifically described these 8 letters in her complaint and then actually appended them to it. (A.p. 29, 62-113, 164, 165).

During the course of the Arbitration hearing had in June, 1985, Petitioner submitted some seven letters into evidence which she had written to Social Security, the * State Bar, and to her Congressmen for the sole purpose of demonstrating her incidental

damages incurred by reason of Schuman's conversion (Cal. Civ. Code 3336). Schuman at no time made any motion to amend nor to have these letters (each written some three years before) to be considered under her Cross-Complaint. (Having conducted no discovery during the pendency of the litigation, she apparently did not know of this correspondence.) Consequently, the hearing in no way addressed the content of these seven letters and resultantly Petitioner had no warning, no opportunity to object, and perceived no occasion to have to mount any defense whatsoever. (A. p. 27, 122-124, 161-163)

The Arbitrator took the matter under submission and rendered a decision wherein he repeatedly used intemperate and inflammatory language to castigate Petitioner severely, claiming that she was engaged in a "personal vendetta" and that each of her accusations against Schuman were but "perceived grievances". (A. p. 26, 30, 31, 37)

He then went onto expressly conclude that Petitioner....

had no contractual relationship with either client...(A. p. 31)

had no interest in their cases...(A. p. 33)

had no right, as against Schuman, to claim the attorney/client relationship... (A.p. 31-33)

had no right, as against Schuman, to exercise dominion or control over the fees (A. p.32, 33)

no right to claim the files...(A. p. 33)

The Arbitrator also specifically and expressly explained how and why he reached these conclusions about the legal effect of the facts he had found. Schuman had all these rights. Significantly, it was not because of some peculiar terms of her arrangements with Petitioner. Rather rather he explained it was because it was Schuman and not Petitioner who met the client and performed all the legal services for them!!! Besides, the Petitioner could hardly claim a "relationship" with the clients when they did not know who she was

and who said they wanted Schuman as their
*2
attorney! (A.p. 31, 33)

In referring to the underlying written contract, he relegated it to a footnote and actually insinuated it named Schuman as "attorney"!! (A.p. 21 fn. 1)

The Arbitrator dismissed Petitioner's
*3
claims of privilege by inventing brand new exceptions, and applying them retroactively. For example, he claimed no privilege applied because Petitioner's statements were concluded to have been "unjustified". (A. p.37) Similarly Petitioner's statements were

* 2 Rather than recognizing that this evidence demonstrated that Schuman had likely been misrepresenting her status to the clients all along and thereby overtly breaching the fiduciary duty owed her employer, this evidence was seen as further proof that Petitioner should have no rights!!

*3 Every letter involved here was squarely within California privileges, the unpleaded letters were absolutely privileged for two separate reasons having been written to public agencies regarding litigation! (C.C. 47(2)(3) Moreover, every unpleaded letter was subject to California's one-year statute of limitations. (Cal. Civ. Code 340) But, no opportunity was given to so inform the Arbitrator of either of these defenses. (A.p. 19, 120)

found to have been "malicious" because they were "decidedly unflattering" to Schuman. (A. p. 27, 37)

In justifying his decision, he made express reference to "fifteen letters", including, without any distinction being recognized, the 8 pleaded along with the 7 submitted into evidence by Petitioner per above!! (A. p. 28)

In addition, the Arbitrator made numerous other references to the unpleaded, unlitigated letters in attempting to justify his award. He referred to the unpleaded letters he was relying on to justify the award by their addressees: i.e. "Social Security", "Congressman", and "State Bar". He even referred to one unpleaded letter by its date. Most significantly, when he quoted the language he found most "defamatory", the record reveals that great majority of the remarks are found no where in the pleaded letters! (A. p. 27, 28, 38, 73-113)

The Arbitrator then proceeded not only to

award Schuman \$10,000 in punitive damages and \$4,500.00 in compensatory damages by reason of Petitioner's communications, but he also awarded her a generous "referral fee" for having referred these two cases to Petitioner (i.e. the same 2 cases in which he had already decided Petitioner had "no interest" and "no rights")!!? (A. p. 38, 39)

If Petitioner's letters are viewed in light of the proper and normal legal effect mandated by established agency principles, the overwhelming majority of her statements regarding Schuman are patently truthful. To the extent that applying the proper legal effect to the undisputed facts does not necessarily demonstrate the truthfulness of the remaining statements, the record demonstrates that these too were substantially truthful in that they are corroborated by Petitioner's unrefuted Declaration, by disinterested witnesses, and by Schuman's own admissions. (A. p. 125-132)

The within record shows that Petitioner

made repeated attempts to have this large patently insane judgment set aside by timely motions and writs taken before every court in the state system. The Municipal Court Judge ignored the procedural due process arguments as well as the other egregious errors and perfunctorily denied the Motion to Vacate under circumstances which suggest that he had not even perused her extensive brief. (A. p. 53-60, 133, 134, 169-171)

Upon filing a timely appeal to the Appellate Division of the Superior Court she was confronted with overwhelming bias against reversing the lower court. Once again, the circumstances suggested that the panel had not even read her pleadings. This inference is virtually proved conclusively in that this Alameda County Appellate Panel incredibly CITED PETITIONER TO SHOW CAUSE WHY SHE SHOULD NOT BE ASSESSED SANCTIONS FOR "FRIVOLOUS APPEAL"...apparently a technique intermittently used by these judges to discourage appeals! (A. p. 55, 169, 171, 172)

What occurred at the hearing on "frivolous appeal" further reinforces an inference of judicial misconduct. After Petitioner fully apprised the panel of all the egregious errors in the award, they took the issue under submission. They then judiciously waited until both the District Court of Appeal and the California Supreme Court had denied discretionary writs, and then proceeded to levy sanctions of \$2,500 for "frivolous appeal" by a decision which patently misrepresented the record, and under circumstances highly suggestive not only of bad faith but of actual malice! (A.p. 41-48, 172-176)

In the meantime, the Respondents have undertaken numerous collection proceedings against Petitioner, including the placing of liens against her name, thereby affecting her credit, have summoned her to two Orders of Examination, have procured an ex parte order to have her to be served by mail with a contempt citation for failing to pay these

large sanctions (contrary to California law, see infra), and then procured a bench warrant to issue which recited "Bail \$50,000 cash only" (a provision which was patently contrary to California law); finally Respondents acted in concert with one of the local judges to have Petitioner sentenced to 5 days in jail for contempt because she invoked the Fifth Amendment under circumstances where its proper applicability was obvious. (A. p. 141, 149, 198-215, 135, 136, 157-158, 196)

In then attempting to obtain relief from this jail sentence, Petitioner brought a Writ in the Superior Court relative to the contempt citation, and coupled with it a motion to be relieved of the judgment as void on its face (outside the issues). After tentatively deciding to deny her entirely, the Presiding Judge issue an order dissolving the contempt, but refused to vacate the judgment under circumstances which hardly constituted either a full or fair hearing.

(A. p. 216-221)

Upon bringing a complaint in U.S. District Court, Petitioner's complaint was summarily dismissed with Judge Vukasin (a former judge of Alameda County) quoting the inflammatory language of the Arbitrator at length and with open approval! He also then commented that as far as he was concerned the Arbitrator had made no error of fact or law! (A. p. 191, 192, 195) He also found that he had not exceeded the scope of the pleadings because Schuman had pleaded "defamation" and had recovered for defamation. (A. p. 195) Accordingly, he concluded Petitioner's federal complaint was "frivolous" and she was, once again fined sanctions of \$5,000.00 under F.R.C.P. 11, this amount being the equivalent of twice the sum Respondents claimed to have been incurred as attorney fees!!" (A. p. 189, 197)

Petitioner thereupon sought a summary reversal and a stay from the Ninth Circuit, only to be again summarily denied, and

once again threatened with further sanctions by the Ninth Circuit! (A. p. 222)

INTRODUCTION - TWO WHOLLY DIFFERENT BASIC ISSUES

The within Petitioner alleges that the Arbitration Award was predicated upon a lack of subject matter jurisdiction by reason of its having been based, in part, on seven letters, each of which constituted separate and distinct causes of action about which she had neither any notice nor any hearing. Such collateral attacks in federal district courts predicated upon a challenge to a state judgement for lack of subject matter or personal jurisdiction have long been recognized. However, there exists no comparable recognition for constitutional challenges to final state court judgments which are assailed for other sorts of constitutional defects in the U.S. District Courts. This dichotomy was recognized and discussed in Manufacturers Record Publishing Co. v. Lauer (1959) 268 F. 2d 187, 191-2; Nongard v. Burlington County Bridge Comm.

(D.C.N.J. 1955)* 133 F.S. 238. Since the applicable law as enunciated by the federal courts is entirely different, these two issues will be treated separately.

IF A STATE COURT HAD BOTH PERSONAL AND SUBJECT MATTER JURISDICTION, AND ENTERED A FINAL, CIVIL MONEY JUDGEMENT, MAY THAT JUDGMENT EVER BE THE SUBJECT OF A COLLATERAL ATTACK IN A U.S. DISTRICT COURT?

The United State Supreme Court in Rooker v. Fidelity Trust Company (1923) 263 U.S. 414, 44 S. Ct. 149, 68 L.Ed. 362, held that where state court with both subject matter and personal jurisdiction, rendered a judgement after a full hearing, the decision was responsive to the issues, and that judgment, in turn, had been "affirmed" by a state's Supreme Court, then a U.S. District Court had no jurisdiction to entertain a proceeding to reverse or modify the judgment for constitutional error. The U.S. Supreme Court held that only it had jurisdiction to affect such a judgment. As will be demonstrated, many federal courts have viewed this case as the seminal decision

the lower federal courts of any jurisdiction to review a final state court judgment even if the substantive error violates constitutional rights.

Juxtaposed against that ruling and its progeny in the federal courts is Mitchum v. Foster (1972) 407 U.S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705, which addressed a civil rights action brought under 42 USC 1983 against judges and law enforcement officials for having undertaken to close down an adult bookstore. The U.S. Supreme Court reversed the District Court's dismissal and found that civil rights actions were expressly exempt *4 from the provisions of 28 U.S.C.A. 2283.

*4 Cases involving this anti-injunction law cause a major lack of logical consistency. Where state court litigation between private parties is still "pending", some cases hold that a U.S. District Court has an "unflagging obligation" to exercise its jurisdiction in 42 USC 1983 cases if the constitutional challenge is valid, and provided there is no vital state interest at stake. Miofsky v. Superior Court (1983) 703 F. 2d 332, 338; Traughber v. Beauchane (1985) 760 F. 2d 673. Yet, as will be shown, some federal courts so rigidly apply Feldman and Rooker that any actions relative to obtaining relief from final state court judgment are automatically

The United States Supreme Court in Mitchum (supra) observed that the purpose of 42 USC 1983 was to effectuate the Fourteenth Amendment and to establish the federal government as guarantor of basic federal rights against state power "...whether that action be executive, legislative, or judicial". (p. 2161). The purpose was to "...throw open the doors of the United States courts to those whose rights under the Constitution are denied or impaired"...to interpose the federal courts between the states and the people". (p. 2161-62). The likelihood of meeting any of these goals greatly hampered and rendered infeasible if there is to be any outright prohibition of review by U.S. District Courts of final state judgments as espoused by the within panel.

* 4 (contd) dismissed out of hand and without regard to whether they involve palpable constitutional violations. From the standpoint of state judges, it would seem interfering in on-going litigation is the far greater affront. From the standpoint of the litigant, it would seem far more important to insure that recourse is available if a final state court judgement violates constitutional rights.

Another line of U.S. Supreme Court cases, while not per se involving a challenge to a final state court judgement, does address the affect of prior state court judgments upon related civil rights actions brought in U.S. District Court. For example, in Haring v. Prosise (1983) 462 U.S. 304, 103 S. Ct. 2368, 76 L. Ed. 3d 595 in deciding whether to prevent a criminal defendant convicted in a state court from pursuing a civil rights action for damages against police for an illegal search, the high court decreed the civil rights action could proceed inasmuch as the federal plaintiff had pleaded guilty, and hence the issue of the illegal search was NEVER LITIGATED in the state court. In coming to this holding, the high court observed:

"As a general matter, when when issues have been raised, argued, and decided in a prior proceeding, and are therefore preclusive under state law, redetermination of the issues may nevertheless be warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." (p. 2375) (citing Montana v. United States (1979) 440 U.S. 147, 164 n. 11, 99 S. Ct. 970, 979, n. 11, 59 L. Ed. 2d 210.

Another approach to the same issue was addressed in Migra v. Warren City School District Board of Education (1984) 465 U.S. 75, 104 S. Ct. 892, 896, 79 L. Ed. 2d 56, which held that where a state court had RECOGNIZED the federal claims AND had provided a FAIR PROCEDURE for determining them, then a federal court must accord a state court judgment the same preclusive effect as required by the laws of the state of origin. (p.897)

Basically, the same concept was also enunciated in Allen v. McCurry (1980) 449 U.S. 90, 101 S. Ct. 411, 66 L. ED. 308, which also required that a state court, otherwise acting within its proper jurisdiction, to have "shown itself willing and able to protect federal rights". (p. 418)

Indeed, contrary to these holdings, the within Ninth Circuit panel flatly refused to make any review of the record so as to evaluate whether ^{petitioner} /actually had any full or fair opportunity to litigate any claim, or

whether the state courts had even recognized or considered the federal issues. Instead, it chose to interpret Dist. Court of Columbia Court of Appeals v. Feldman 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 to stand for a flat, unequivocal, unyielding lack of jurisdiction to undertake any review of the state court proceeding no matter the circumstances, and no matter what the state court judgment was based upon or how it was determined.

Indeed, if the only avenue of recourse a litigant has against an unconstitutional final state judgment is certiorari to the United States Supreme Court, then, as a practical matter, we have effectively absolved the whole court system of every state from having to respect the guarantees of the Fourteenth Amendment.

Hopefully that is not what was intended by the Feldman decision. Indeed, it seems the decision should be read in light of its somewhat one-dimensional facts. After

reviewing the record, the high court simply found that the order from "a jurisdictions highest court" (necessarily) "encompassed the constitutional issues raised"...i.e. a supreme court had actually decided the point. Moreover, the District of Columbia then issued an explanation which was eminently reasonable, and no hint of any abuse of authority or arbitrariness presented itself.

Subsequent to Feldman (supra) is a series of cases wherein the lower federal courts directly grappled with an arbitrary exercise of power by a State Supreme Court:
*5
Robinson v. Ariyoshi (1985) 753 F. 2d 1468;
(1977) 441 F. Supp. 559; Sotomura v. County

* 5 The Robinson case (supra) was then brought into the United States Supreme Court, 477 U.S. 902, 106 U.S. 3269, and was overruled only in part by reference to Williamson County Regional Planning Comm. v. Hamilton Bank of Johnson City (1986) 473 U.S. 172, 105 S. Ct. 3108. The Supreme Court's companion case simply held that an award of damages was premature in that the civil rights defendants had, not yet, undertaken to enforce the judgment. Hence, it was left uncertain whether and on what grounds, if any, the U. S. District Court had properly assumed jurisdiction.

(hereinafter called the "Robinson cases")

In the Robinson cases, the Supreme Court of Hawaii, retroactively, and sua sponte decreed that certain water/real property rights would belong to the state even though these same rights had been long ago vested by both Hawaii law, and prior litigation, in the civil rights plaintiffs. Although the Hawaii Supreme Court judgment was "final" and it was supposedly based on "public policy", the federal district court nevertheless assumed jurisdiction under 42 USC 1983. In justifying this intervention, the U.S. District Court *6 referred to BOTH substantive and procedural irregularities in the Hawaii Supreme Court's decision.

* 6 The claimed procedural irregularities arose because the decision (sua sponte) of the Hawaii Supreme Court went beyond the legal assumptions advanced by either party at trial and gave relief not specifically requested. It was further pointed out that the federal plaintiffs had been subject to an "almost farcical rehearing" when they sought to raise the federal issues after the decision. No lack of personal or subject matter jurisdiction appeared to be involved.

In particular, it was characterized as being a "shocking, violent deviation from solidly established case law". The decision was further said to involve a change of law which was "totally unexpected and impossible to have been anticipated" (Robinson, Dist. Ct. p. 566, 580, 583).

As a result of the apparent conflict between and ambiguity in the rulings of the U.S. Supreme Court, there exists pervasive uncertainty among federal courts as to when or whether they may review state court judgments on constitutional grounds.

Certain decisions reflect an open refusal to follow the Robinson cases ^{*7} (supra) or have tried to greatly limit their application. Are the Robinson cases mere odd aberrations, or do they embody an exception to Rooker and Feldman?

*7 For example Franco v. County of Marin 579 F. Supp. 1032, 1035; Reynolds v. Georgia (1981) 640 F. 2d 702, 707; Wood v. Orange County (11th Cir., 1983) 715 F. 2d 1543, 1546. However, each of these cases appeared to involve facts which did not even approximate the arbitrariness and/or unconscionability of the within judgment.

In both the Robinson cases (supra) and Worldwide Church of God v. McNair (9th Cir., 1986) 805 F. 2d 888, the applicable standard by which to decide whether a U.S. District Court has subject matter jurisdiction to review a final state court judgement was seen as wholly depending upon whether there had been an ACTUAL CONSIDERATION by the state court of the constitutional issue and a DECISION ON THE ISSUE presented. (Robinson p. 892; McNair 1472). The "inextricably intertwined" standard found in Feldman (supra) and the "full and fair opportunity to litigate" standard of Allen (supra) were seen as being but "two sides of the same coin". (McNair p. 892, Robinson p. 1492).

If this is the applicable standard, then two issues are presented. First, did Petitioner have a "full and fair opportunity to litigate" her constitutional claims, and if so, were these claims decided by the state courts? Firstly, a fundamental requirement of minimum due process has been held to be

the "opportunity to be heard at a meaningful time and in a meaningful manner". Matheus v. Eldridge (1976) 424 U.S. 349, 96 S. Ct. 893.

In the instant case, just as in the Robinson cases, the Arbitrator decision sua sponte created most of what has become the federal issues. Petitioner thereafter raised the constitutional issues at every juncture. (A.p. 133-134, 169-174, 176, 183-184, 186-187) Nevertheless, the undisputed record indicates that Petitioner's attempt's to have the award vacated were (just as in Robinson) given short shrift by every court and her motions "denied" without any explanation. (A.p. 53, 54, 55, 56, 57, 58, 59, 60, 61) In the initial motion made in Municipal Court, the circumstances suggested the judge had not even read her pleadings. (A.p. 169-171)

What is perhaps the most probative evidence that Petitioner was given no opportunity for any sort of meaningful hearing was the shocking fact that the Appellate Division of the Superior Court,

after receiving her thorough brief raising all points (gross errors of agency law, disregard of privileges, exceeding the scope of the submission, contradicting the contract, etc.), ACTUALLY CITED HER TO SHOW CAUSE RE "FRIVOLOUS APPEAL"!!! (A.p. 55)

This act clearly demonstrates that these judges not only totally failed to recognize the federal issues, but they were apparently intent upon simply rubber stamping appeals regardless of their merits and likely without even reading them!! (A. 171-172)

To have then followed this citation with a decision attempting to justify the assessment of huge sanctions (\$2,500) for "frivolous appeal" by an opinion which utterly misrepresented the record (A.p. 49-51) is perhaps this Petitioner's most probative evidence of the bias, bad faith, and even malice on the part of the state judges involved.

Apart from the summary denials of writs without opinion, the only other interaction

Petitioner had with a judge was when she joined the issue of her jail sentence (for taking the Fifth Amendment, A.p. 198-215) with a motion to vacate the judgment as void and brought a Petition before the Presiding Judge of Alameda County. He flatly disallowed oral argument on the issue of "void judgment", gave non-sensical reasons for refusing to set aside the judgement, (A. p. 219-21), and then informed those assembled that "29 judges...addressed the issue" (A. p. 220)(including in that number, the 9 justices of the U.S. Supreme Court which had simply denied certiorari!), and then flatly informed Petitioner he was "not about to reverse" a finding of his "peers"^{*8} (A.p. 220). Significantly, his bias was such that he too threatened Petitioner with further sanctions (A. p. 218). Finally, he was more than willing to adopt as true an outright

*8 Especially when to do so would draw attention to the fact that his "peers" had actually imposed a large fine on Petitioner for appealing a judgment "void on its face"!

misrepresentation of the record by Respondent (Gibbs) and then abruptly called another case. (A. p. 221).

When Petitioner then appealed the denial by the Superior Court of her motion to vacate the judgment (by reason of being "void on its face") to the District Court of Appeal, she once again confronted unbelievable bias, and a resolve to just get rid of the case. (A. p. 29-51). Not only did it summarily proclaim that all her claims were "patently meritless" (A. p. 51), but it sought to pretend that the matter before it concerned the sanctions (A. p. 50-51), and since the sanctions were not paid yet, somehow this rendered the judgment (issued some four years before) as not "final", and hence not reviewable on appeal!!!? Probably no law was cited to substantiate this odd conclusion, because the law is clearly to the contrary. A California judgement becomes "final" when the time for appellate review has elapsed. Jennings v. Ward (1931) 114 CA 536, 300 P. 129. This

decision of the District Court of Appeal is, in light of the holding in Hunter v. Superior Court (1939) 39 CA 2d 100, nothing more than a flippant, irresponsible disregard of legal duty. Not only did this court refuse to hear Petitioner, but it perverted both the facts and law to avoid doing so.

Not only was there no semblance of a full or fair opportunity ever granted to litigate any issue, but clearly not one federal issue was ever recognized, let alone considered or decided. Moreover, the within judgment was neither "affirmed" nor "decided" by the Supreme Court of California. Rather, it was an arbitration award simply rubber stamped by each court in turn.

Clearly, what occurred here was no considered "change of law" for any "public purpose" or to respond to changing conditions, rather we have a travesty predicated upon demonstrably egregious ignorance of elementary law, or just possibly

on bad faith. * 9

If, both the lack of a full and fair opportunity to litigate, the failure of the state courts to even recognize the substantive federal issues is not sufficient to overcome Rooker (supra) and Feldman (supra), then surely the standards of Migra (supra) would accomplish this purpose!? Where the issue is substantive error, there are California cases indicating that res judicata is not necessarily applied in special circumstances where errors in a judgment result in a manifest injustice. Greenfield v. Mather (1948) 32 C. 23, 35, 194 P. 2d 1; Louis Stores v. Department of Alcoholic Beverage Control (1962) 57 C. 2d 749, 757; City of Los Angeles v. City of San Fernando (1975) 14 C. 3d 199, 200.

*9 Just how could a licensed, California attorney make such errors in good faith, especially after having read the letters Petitioner wrote trying to explain agency law to lay clients? (A.p. 85-93, 98-100, 104, 111)(A.p. 36)

WHY AND HOW DID THE ERRORS IN THIS JUDGMENT AMOUNT TO A CONSTITUTIONAL DIMENSION?

STANDARDS SET BY U.S. SUPREME COURT:

If based upon the foregoing showing a U.S. District Court had jurisdiction to review the within judgment, then the next issue is what degree or kind of error will properly subject a state court judgment to collateral attack in a U.S. District Court?

In several old, rather obscure cases the U.S. Supreme Court itself reviewed state court judgment challenged on grounds of substantive error. Although each was, in the overwhelming majority of instances, affirmed, the high court enunciated certain standards to characterize the degree of error in a decision on which a state judgment is based which would violate substantive due process:

"gross and obvious, coming close to arbitrary action" (Roberts infra p. 691)

"plain rights have been ignored" (Roberts infra p. 692)

"whether the decision of the state court rests on a fair or substantial basis" (Demorest p. 388)

"a perverse reading of the law"
(O'Neil *infra* p. 26)

"choice is clearly wrong, a display of
arbitrary power, not an exercise of
judgment" (Mathews *infra* p. 185)

O'Neil v. Northern Colorado Irrigation Co.
(1916) 242 U.S. 20, 37 S. Ct. 7, 61 L. Ed.
123; Demorest v. City Bank Farmers' Trust
(1944) 321 U.S. 384, 388, 64 S. Ct. 397, 88
L. Ed. 497; Mathews v. De Castro (1976) 429
U.S. 181, 185, 97 S. Ct. 431, 434, 50 L. Ed.
2d 389; Roberts v. City of New York (1935)
295 U.S. 264, 55 S. Ct. 689, 692, 79 L. Ed.
1429.

THE ARBITRATOR TURNED AGENCY LAW UPSIDE DOWN AND THEREBY TRANSFORMED TRUTH INTO LIES

Firstly, the Arbitrator found the basic
facts to be substantially as alleged by
Petitioner. (A. p.18-40) When those bare
facts are supplemented by the unrefuted
Declaration of Petitioner, (A. p. 114-132)
only one legally plausible, simple conclusion
results: Schuman made an outright referral
of both clients to Petitioner (this is what
any "referral fee" pays for!). She was then

assigned by Petitioner to service these clients and did so acting only as Petitioner's employee.

Inasmuch as Schuman's subsequent acts went far beyond what would ever be justified as self-help, Petitioner's accusations against Schuman in her letters were justified and her complaints were far more than the "perceived grievances" as characterized by the Arbitrator. (A. p. 26)

If one applies elementary agency principles to the large array of undisputed evidence, only one rational conclusion presents itself: what we had was a typical, universally understood agency relationship between Schuman and Petitioner, which relationship, in turn, brought into play a whole body of fundamental, indisputable, universally recognized agency principles which, in turn, clearly spell out the respective rights, duties, and obligations of both Petitioner and Schuman. Schuman had given up her rights in and to these clients,

the fees generated, and their case files when she "referred" them to Petitioner. This becomes an inescapable fact when one notes she both sought and received what she characterized as a "normal referral fee". (A. p. 62, 29,

*10 Not only did Schuman fail to file any Declaration to contradict the sworn Declaration of Petitioner (see fn. 1), but throughout this litigation her only "defense" has consisted of the naked claim that these people were somehow "her clients". However, she admitted her sole method of informing Petitioner of this fact was that while working on their cases in Petitioner's offices she so referred to them! (A. p. 125-126) Her explanation as to why Petitioner's name appeared on the contract she procured the clients to sign was equally inane. (A. p. 132). In subsequently defending the within civil rights action, Respondent Gibbs, apparently recognized not only the travesty which occurred, but also the indefensibility of what Schuman had done. His Declaration (A. p. 178-189) is typical of his various pleadings filed in opposition, and his tactics are identical: engage in obvious evasions, half-truths, insinuated facts, insert ambiguous statements, belittle the significance of the case, and then feign a lack of understanding. However, his primary tactic has consistently been to argue that discretionary denials suffered by Petitioner "prove" the "merit" of Schuman's position. (E.g. A. p. 183, 184, 186) He has repeatedly counted in the nine justices of the U.S. Supreme Court who denied certiorari (A. p. 61) as among those many judges Petitioner has "failed to convince...of the merits of her cause". (A. p. 183)

Thereafter, Schuman's only connection to the clients or their cases was derived from and through Petitioner. Her sole right was to her wages. Once Petitioner terminated Schuman every contact made with or about these clients' affairs was both contrary to agency law and violative of Rules of Professional Conduct (e.g. 2-100, 4-100). See Pollack v. Lytle (1981) 120 CA 931, 175 Cal Rptr 81. None of these rights or duties would be affected because of a later financial dispute over an unrelated matter.

Moreover, in then utterly disregarding the plain import of the underlying contract right in evidence before him, (which ought to have been determinative of Petitioner's rights) the Arbitrator made findings directly
*11
"contrary to undisputed fact".

It would indeed be difficult to imagine
a set of facts involving more egregious

*11 This is one basis regarded by the Third Circuit in Wood v. Conneault Lake Park (3rd Cir., 1967) 386 F. 2d 121, as justifying the intervention of a U.S. District Court in a suit challenging a state court judgment on due process grounds.

error. We do not have "mere error" here, rather we have a decision which should more than meet the "gross and obvious" standard. These errors do not just "come close to arbitrary action", rather the reasoning goes beyond arbitrary into insane.

That these egregious errors were prejudicial is self-evident for it is demonstrable from the record that it is Schuman, and not Petitioner, who ought to be liable for substantial damages. Petitioner has suffered to have her patently truthful statements transposed into lies by an Arbitrator who, in effect, turned the law upside down over and over again, and then high-handedly chastized her verbally and assessed large compensatory and even punitive damages against her!

THE ARBITRATOR DISREGARDED THE ESTABLISHED LAW OF "PRIVILEGE"

Having apparently resolved to punish Petitioner, it mattered not that every letter clearly came, at least within the

"conditional privilege" discussed in Williams v. Taylor (1982) 129 CA 3d 745, 181 Cal Rptr 423. The Arbitrator likewise had no grasp of "absolute privilege" which applied to letters to public agencies or where a letter concerned proposed litigation. He simply circumvented the lot by proclaiming that Petitioner lost her "privilege" because her statements were not "justified"!! (A. p. 37) Indeed, if statements are "justified" one needs no "privilege". See Hagendorf v. Brown (9th Cir., 1983) 669 F. 2d 478, 480; Lebbos v. State Bar (1985) 165 CA 3d 656. (See discussion in First Amendment Section regarding privileges to contact public officials and agencies).

The U.S. Supreme Court has previously held in other contexts that a privilege once granted by the state, like a property right, it may not be taken away on an arbitrary basis. Graham v. Richardson (1971) 403 U.S. 366, 91 S. Ct. 1848, 29 L. Ed. 2d 408; Shapiro v. Thompson (1969) 394 U.S. 618, 89

S. Ct. 1322. Similarly, *Miofsky v. Superior Court* (supra) regarded a state's abrogation of the doctor/patient privilege as a sufficient ground for a 42 U.S.C. 1983 action.

THE ARBITRATION AWARD ABROGATED PETITIONER'S FIRST AMENDMENT RIGHTS

For the Arbitrator to have imposed substantial damages against Petitioner for "defamation" under circumstances indicating her statements were, in fact, truthful, was not only "arbitrary", but may well have violated her First Amendment rights. There is dicta in several cases, (e.g. *Associate Press v. Walker* (1967) 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094; *Curtis Publishing Co. v. Ruth* (1967) 388 U.S. 130, 87 S. Ct. 1975; *Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789, which imply that ALL truthful communications are protected by the First Amendment. However, no case actually holds that an individual who engages in private communications about non-public matters is

entitled to First Amendment protection for truthful statements. This case provides a unique opportunity to address this important issue inasmuch as "truth" is rarely openly punished, and whether a given statement is true is normally always a "fact issue" left
* 12
solely to the trier of fact.

Secondly, - by having assessed both compensatory and punitive damages because Petitioner wrote to the State Bar, her Congressman, and the Social Security Administration, the Arbitrator was not only acting "arbitrarily", and directly contrary to established California law (e.g. Lebbos v. State Bar (1985) 165 CA 3d 656) but he was, in addition, also abridging Petitioner's First Amendment Right to Petition the Government. Under the holding of McDonald v.

*12 In any human society it is just such forms of speech which comprise the overwhelming amount of all communications. Consequently, if important issues are in any way gauged by the numbers potentially affected, the need for a decision on this point stands in stark contrast to the need to clarify the law for the comparatively tiny number of malcontented grandstanders who would burn the flag.

Smith (1985) 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384, the high court inferred that a state had to recognize, at least, a conditional privilege for communications with public officials or agencies. This inference then became the holding of the Eighth Circuit in Bagley v. Iowa Beef Processors (8th Cir., 1986) 797 F. 2d 632.

Consequently, when this Arbitrator assessed both punitive and compensatory damages for Petitioner's letters to her Congressman, to Social Security, and to the State Bar, it would seem he was failing to recognize even a "conditional privilege". If one has made statements to public agencies in good faith there is to be no liability. Indeed, how was Petitioner supposed to have known that it was Schuman who had all the rights, when she was "referred" the clients, paid all the expenses, paid her associates salary for servicing them, and had her name on the written retainer agreement as sole attorney??!

• Even if the Arbitrator's Award on its face violated Petitioner's constitutional rights, we once again confront the important issue extant: whether a patent violation of ones First Amendment rights by a final state court judgment can become the subject of collateral attack in U.S. District Court if there has been no full or fair opportunity to litigate those rights in state courts, and no state court has recognized, addressed or decided any such issue. Authority on this point is more than scarce. In the case of Crosby v. Broadstreet (2nd Cir., 1963) 312 F. 2d 483, a federal court order long before entered under a stipulation was seen as a "prior restraint" and set aside under F.R.C.P. 60 by a circuit court who characterized it as "void". If a final state

*13 There was indeed no opportunity to litigate this privilege inasmuch as no letter written to these public officials or agencies was pleaded, and Petitioner had no knowledge or warning that they were in issue until after she received the award. Thereafter, she raised these privileges at every juncture only to again and again be turned away (see supra), with no court recognizing the issue let alone addressing it.

court judgment is predicated upon a patent violation of one's First Amendment right, is that judgment^{*14} not "void" and open to collateral attack in a U.S. District Court??

MAY A U.S. DISTRICT COURT ENTERTAIN A COLLATERAL ATTACK ON A FINAL JUDGMENT OF A STATE COURT FOR DEFAMATION IF IT IS PREDICATED, IN PART, UPON LETTERS WHICH WERE NEITHER PLEADED NOR LITIGATED?

It has long been recognized and understood that a U.S. District Court may entertain a collateral attack upon a final state court judgment if the same were rendered without "subject matter jurisdiction". Ritchie v. Sayers (Cir. W. Va. 1900) 100 F. 528, 531; Textile Bank Co., Inc. v. Rentschler (1981) 657 F. 2d 844; Comprehensive Merchandising Catalogues, Inc. v. Madison (7th Cir., 1975) 521 F. 2d 1210; Manufacturers Record Publishing Co. v. Lauer (supra); Nongard v. Burlington County Bridge Comm. (supra)

* Since only part of the within judgment was predicated upon the unpleaded letters, the whole is void on this ground because the award was expressed as a lump sum incapable of segregation. Perini v. Perini (1964) 225 CA 2d 399, 37 Cal Rptr 354; Capital Bond & Investment v. Hood (1933) 218 C. 729, 24 P. 2d 765.

It has long been clearly and indisputably established that a judgment is "void on its face" by reason of a LACK OF SUBJECT MATTER JURISDICTION, if it is predicated upon "issues" which were not pleaded, and upon which the parties had not been heard. See Reynolds v. Stockton (1891) 140 U.S. 252, 266, 268-69, 11 S. Ct., 773, 35 L. Ed. 464; Standard Oil Co. v. Missouri (1911) 224 U.S. 270, 281, 34 S. Ct. 406, 56 L. Ed. 760; J.P. Jorgenson Co. v. Rapp (9th Cir., 1907) 157 F. 732, 738-9.

Such rules have been consistently characterized as "fundamental" and are considered to be "essentials of due process" and "fair play". Sylvan Beach v. Koch (8th Cir, 1944) 140 F. 2d 852, 861-62; accord: Armstrong Cork v. Lyons (8th Cir., 1966) 366 F. 2d 206; Baar v. Smith (1927) 201 C. 87.

The requirements of specificity in pleading are more strict for "defamation" than for almost any other sort of civil action. So universally recognized is this requirement that the only issue extant in the

developing case law is the degree of exactitude between the words pleaded and the words proved. West's Digest, Libel and Slander, Key No. 85.

Both California and federal authorities are wholly in accord. Fleet v. Tichenor (1909) 156 Caf 343; Williams v. Gorton (9th Cir. 1976) 529 F. 2d 668. Some courts have characterized the need to plead "haec verba" as a NOTICE requirement. Asay v. Hallmark Cards, Inc. (8th Cir. 1979) 594 F. 2d 692, 698-9; Holliday v. Great Atlantic and Pacific Tea Co. (8th Cir., 1958) 256 F. 2d 297, 302.

In point of fact, each separate letter, even though growing out of the same dispute/transaction is BY DEFINITION A SEPARATE, DISTINCT CAUSE OF ACTION (i.e. not just a separate "issue")^{*15} Heuer v. Basin Park Hotel and Resort (W.D. Ark., 1953) 114 F. Supp. 604; Haddad v. McDowell (1931) 213 C.

^{*15}The decision of the Ninth Circuit referred to the seven, separate unpleaded letters as "evidence" of defamation, thereby blurring the material distinction between what the law sees as "evidence" on an "issue", and what is actually a separate "cause of action". 690, 3 P.2d 550. (A. p. 11-12)

Indeed, such holdings fully comport with logic and common sense. Each separate letter typically brings into play its own set of facts and issues, damages, defenses, witnesses, pre-trial discovery needs, and different applicable privileges.^{*16}

Nevertheless, this panel of the Ninth Circuit has concluded that because this judgment resulted from arbitration, none of these "fundamental rules" should apply, and Petitioner's complaints are nothing more than "technical argument". (A. p. 11-12) It is further asserted by this panel in their "disposition ... not appropriate for publication" (A. p. 1), that "an arbitrator is

^{*16} That whole unlitigated letters may properly form the basis for a defamation award, becomes a ludicrous proposition, particularly in light of Bird v. Huber (1918) 179 C. 245.

^{*17} That severe prejudice resulted to Petitioner from these proceedings is self-evident. Every unpleaded letter was written to a public official or agency and was hence absolutely privileged, (C.C. 47(2)(3) but she had no opportunity to brief or even explain this to the Arbitrator. Moreover, the statute of limitations had run on each unpleaded letter over 3 years before.

not bound by the formal rules of procedure"! (A.p. 12) Since this was a California Judicial Arbitration, the rules governing the procedures are established by Rule 1613 of the California Rules of Court. This rule, in turn, specifically states that "the rules of evidence governing civil actions apply to the conduct of the Arbitration proceedings, except:" The specific exceptions which are then enumerated by no means even begin to
* 18
authorize what occurred here.

The only substantiating authority cited by the within panel was Sunshine Mining Co. v. United Steelworkers of America (9th Cir., 1987) 823 F. 2d 1289, 1295. A fair reading of
t
his case demonstrates that it in no way

*17 (contd) However, Petitioner had no opportunity whatever to raise either defense. See C.C.P. 340(3), Heuer v. Basin Park Hotel and Resort (W.D. Ark., 1953) 114 F. Supp. 604. Nor did she have any opportunity to decline to submit these causes of action to binding arbitration.

* 18 The enumerated exceptions in Rule 1613 involved only minor changes in the applicable hearsay rules so as to permit certain normally reliable documentary material into evidence without laying a formal foundation.

substantiates holding of the court. Firstly, the Sunshine case does not even address any defamation issue. Secondly, it specifically holds: "...arbitrator's authority is limited to the ISSUE submitted to him by the parties"...an Arbitration hearing is "fundamentally fair" ONLY IF it involved ADEQUATE NOTICE, a HEARING ON THE EVIDENCE, and an impartial decision by the Arbitrator. (p. 1294)

In point of fact, no arbitration case remotely substantiates this panel views.^{*19} When an Arbitrator has decided an "unsubmitted issue" as shown by the face of his award, he is said to have "exceeded the scope of the submission" and his award is invariably vacated. C.C.P. Sec. 1286.2,

*19 In J. R. Norton v. Agricultural Labor Relations Board (1987) 192 CA 3d 874, 888, 238 Cal Rptr 87, it was held that an Arbitrator must not receive evidence on one issue, and then after submission use that same evidence to create new issues not encompassed in the submission. This procedure was specifically held to violate elementary constitutional principles of due process, and this is exactly what occurred here. (See A. p. 12, p. 229)

1141.23; Atlas Floor Covering v. Crescent House & Garden (1959) 166 CA 2d 211, 333 P.2d 194; William B. Logan v. Monogram Precision Industries, Inc. (1960) 186 CA 2d 200, 8 Cal Rptr 789. An arbitration award which goes beyond the issues is invalid altogether. White v. Arthur (1881) 59 C. 33. The United States Supreme Court has already held in an Arbitration context that a state may not grant preclusive effect in its own courts to a constitutionally infirm judgment. Kremer v. Chemical Construction Corp. (1982) 456 U.S. 61, 102 S. Ct. 1883, 1898, 72 L. Ed. 2d 262. It has also been held that when a federal court finds voidness in a judgment it is MANDATORY to grant relief. V.T.A. Inc. v. Airco, Inc. (10th Cir., 1979) 597 F. 2d 220, 224 fn 8.

California law is totally in accord. A judgment which is void on its face (e.g. it lacks subject matter jurisdiction) is entitled to no res judicata, and is open to collateral attack, can be vacated sua sponte, or by motion, even if it had been affirmed on

appeal. Pioneer Land Co. v. Maddox (1895) 109 C. 633; Hayashi v. Lorenz (1954) 42 C. 2d 848, 271 P. 2d 181. Res Judicata is inapplcable with respect to any part of a decision which goes beyond the matters in issue. Del Ricco v. Photochart (1954) 124 CA 2d 301, 268 P. 2d 814; Title Guarantee and Trust Co. v. Monson (1938) 11 C. 2d 621, 631.

MAY INDIVIDUALS BE SUED UNDER 42 USC 1983 BY REASON OF ACTS TAKEN TO ENFORCE A CONSTITUTIONALLY DEFECTIVE STATE COURT JUDGMENT?

The Ninth Circuit panel has misread the Petitioner's complaint. She does not sue Respondents by reason of having to pay the judgment. (A.p.9) Rather her primary ground establishing that these Respondents acted under "color of state law" stems from the many collection proceedings they have been instituting with the aid and participation of state officials. This fact was set out in her federal complaint, discussed in the briefs and addressed in oral argument. (A. p. 141, 149, 195-6)

It has been established by the U.S. Supreme Court that a private party can be sued under 42 USC 1983 if he is a wilful participant in joint action with the state or its agents. Dennis v. Sparks (1980) 449 U.S. 24, 101 S. Ct. 183. A civil rights defendant may be an attorney acting in conjunction with the courts if he has acted in bad faith. Tower v. Glover 467 (1984) U.S. 914, 104 S. Ct. 282, 81 L. Ed. 758. The "action" involved can be collection proceedings. Lugar v. Edmonson Oil (1982) 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed. 2d 482. In Scheiner v. City of New York (E.D.N.Y. 1985) 611 F. Supp. 172, the enforcement of a judgment entered without (personal) jurisdiction was found to be a valid basis for a 42 USC 1983 action. Whether defendants acted in good faith was a fact question to be determined at trial. U.S. General, Inc. v. Schroeder (E.D. Wisc. 1975) 400 F. Supp. 713. Collection activities of these Respondents has been on-going since

prior the filing of the complaint in U.S. District Court, and when a stay was denied, continued thereafter. Petitioner made a Motion to Augment the Record (A. 223-225) so as to call to the Ninth Circuit's attention the harassment and judicial misconduct she had been suffering after the stay was denied. (A. p. 222) Although the same was referred to the panel hearing the appeal (A.p.226), the motion was just ignored. (A.p.1-12).

These Respondents were not only seeking to enforce a constitutionally defective judgment by their various on-going collection methods, but they were willing participants with the judges in further violations of her rights. Under Mitchum v. Foster (supra) federal courts should not abstain if the state proceedings involve bad faith, harassment, or are patently violative of constitutional rights. Accord: Ciaffoni v. Supreme Court of Pennsylvania (D. C. Pa. 1982) 550 F. Supp. 1246, (affirmed without opinion, 723 F. 2d

Not only was the underlying judgment defective in the manners described herein, but the collection proceedings themselves constituted repeated violations of both state and federal law. For the most part, each of these events occurred after Petitioner had petitioned the federal courts for relief, hence a retaliatory purpose may have motivated the state judges involved.

By the standard described in Johnson v. Duffy (9th Cir. 1978) 588 F. 2d 740, 743-44, unquestionably these are proper party defendants.

* 20 For example, at Respondent, Gibbs, urging Petitioner was sentenced to jail for a patently proper invocation of the Fifth Amendment (A.p. 198-215); Respondents procured the judge to sign an ex parte order permitting contempt papers to be served by mail (A. p. 135-136). An act contrary to California law See Brophy v. Industrial Accident Commission 46 CA 2d 278, C.C.P. 1016; Respondents then obtained a bench warrant in connection with proceeding re the \$2,500.00 sanctions, which recited "Bail is set at \$50,000 cash only"! (A. 157-158), an act also contrary to California law, See Cal. Penal Code 1270, 1275, Cal. Const. Art 1, Sec. 12. Respondents were at all times instigators of these events and the judges were most willing participants.

THE SUCCESSIVE ASSESSMENTS OF PUNITIVE
DAMAGES AND SANCTIONS AGAINST PETITIONER
CONSTITUTED PALPABLE ABUSES OF JUDICIAL
AUTHORITY

By the express terms of F.R.C.P. Rule 11, sanctions may only be imposed if the pleadings are in violation of the rule...that is, that they are not "warranted by existing law, nor by any good faith argument for extention or modification or reversal of existing law". Under the terms of California law, sanctions for "frivolous" proceedings may be assessed only if they are such that any reasonable person would see it was utterly devoid of merit. Otworth v. So. Pacific Transportation (1985) 166 CA 3d 452, 212 Cal Rptr 743.

As has been pointed out above, the appeal from the Arbitrator's award was so meritorious that Petitioner clearly ought to have won on any one of several grounds. Moreover, she was entitled to have the judgment vacated without even having to file formal papers in that it was "void on its face".

That two successive courts have seen fit to levy huge fines under these circumstances is highly suggestive of bad faith, malice, and/or even political motivations, particularly on the part of the Alameda County Superior Court Appellate Panel.

The District Court's levy of double the amount of fees and costs accounted for (A. p. 15-17, 189) was clearly improper and unwarranted particularly relative to Petitioner's collateral attack in U.S. District Court on jurisdictional grounds. The remainder of Petitioner's action was wholly analogous to and substantiated by the Robinson cases, especially when they were all Ninth Circuit cases. Petitioner's right to rely on these cases and on cases like Wood v. Conneault Lake Park (supra) was reinforced when the U.S. Supreme Court reviewed the Robinson case and refused to overturn it on jurisdictional grounds. These cases alone would be sufficient to insure

that no sanctions (let alone huge sanctions) would be appropriate in that her action was simply not "clearly barred by unambiguous case law". Gilmer v. City of Cleveland (D.C. Ohio, 1985) 617 F. Supp. 985.

For a U.S. Circuit Court to have then affirmed these large sanctions by a decision which misstated the record relative to Petitioner's grounds, ignored all of the Robinson cases, miscited McNair and Sunshine, invented new, wholly unsubstantiated rules for Arbitrations and then hid the mess in a "disposition not appropriate for publication", would hopefully seem to involve the requisite degree of "departure from the accepted and usual course of judicial proceedings" as to call for U.S. Supreme supervision. Otherwise, it surely seems that these judges may inflict their awesome powers on individual litigants as they please to and on any basis they choose. If what occurred here is in harmony with the "accepted and usual" then indeed our system is not working

and is being used intermittently as a vehicle of oppression, with the litigant having no means of recourse.

It would surely seem that the punitive damages, and the within successive awards of substantial sanctions suffered by Petitioner would not only violate substantive due process, but would likewise violate Petitioner's Eighth Amendment (made applicable to the states by the Fourteenth Amendment) rights to be free of excessive fines and penalties arbitrarily imposed.

CONCLUSION:

To hold that a U.S. District Court may not reverse or modify a final, reasoned decision of a Supreme Court of a state regarding a constitutional issue, is reasonable and in keeping with the fundamentals of federalism and comity. Indeed, why would a single federal trial judge be better able to interpret our constitution than would a state's supreme court?

However, to expand that prohibition to encompass any final state judgment, whether or not any federal constitutional issue was ever recognized, addressed, or decided, is to deny a victim of state court abuses any viable remedy.

With our expanded population and huge case loads inflicted upon courts at every level, such abuses are bound to occur with increasing frequency. By the same token, that same massive case load confronts the U.S. Supreme Court, and effectively precludes it from offering individual litigants any recourse from judicial abuses as a practical matter.

The proper role of the U.S. District Courts relative to final state judgments assailed on constitutional grounds must therefore involve striking a balance. Indeed, U.S. District Courts cannot be expected to entertain "horizontal appeals" from the state's courts, especially when most disputes would likely involve "mere error"

dressed in "constitutional" garb.

However, if a litigant's constitutional rights are to be actually "guaranteed", then U.S. District Courts ought not to be limited to jurisdictional or procedural defects. In point of fact, a lack of substantive due process can give rise to even more unconscionable results, just as occurred here. Indeed, when laypeople speak of "justice", they usually refer to substantive due process. Hence, some jurisdiction over violations of substantive due process which result in unconscionable judgments should be given to U.S. District Courts.

As has been herein pointed out, the U.S. Supreme Court has already enunciated standards by which errors in a judgment can offend substantive due process and thereby assume a "constitutional dimension".

When and if a state court judgment involves errors of that magnitude, (as exemplified by what occurred here) then a U.S. District Court should be required to

assume jurisdiction. Given what appears to be the pervasive bias and lack of objectivity this Petitioner confronted at every juncture, it would surely seem the U.S. Supreme Court need not concern itself with U.S. District Judges unnecessarily usurping state judges.

On the contrary, when confronted by judicial misconduct, it is more likely that judges would typically react just as have the within judges. They were determined to quickly rid themselves of a distasteful case^{*21} fraught with judicial politics, without regard to the consequences to the Petitioner, who has had to perform thousands of hours in legal services trying to vindicate herself, while at the same time suffering the on-going collection proceedings of these respondents who have turned her into a fugitive and have ruined her law practice.

* 21 Not only was each judge, in turn, utterly resolved to just get rid of her case, but their desire was to punish this "audacious" (A. p. 192) woman lawyer and put her in her place by heavy fines for having persisted in proceedings which called attention to what their judicial colleagues had done.

Hence, the far greater likelihood is that, especially in such extreme instances of judicial misconduct (as here), judicial politics would weigh so heavily as to more likely result in unlawful abdication of constitutional duty.

* 22

Unless the U. S. Supreme Court establishes a standard by which the U. S. District Courts can exercise jurisdiction to protect litigants from patent abuses of authority by state court judges, there will be no realistic opportunity of realizing the worthwhile goals enunciated in Mitchum (supra). Certainly, the vehicle through which the high court could best enunciate these standards, would be a case which involved multiple examples of egregious error and

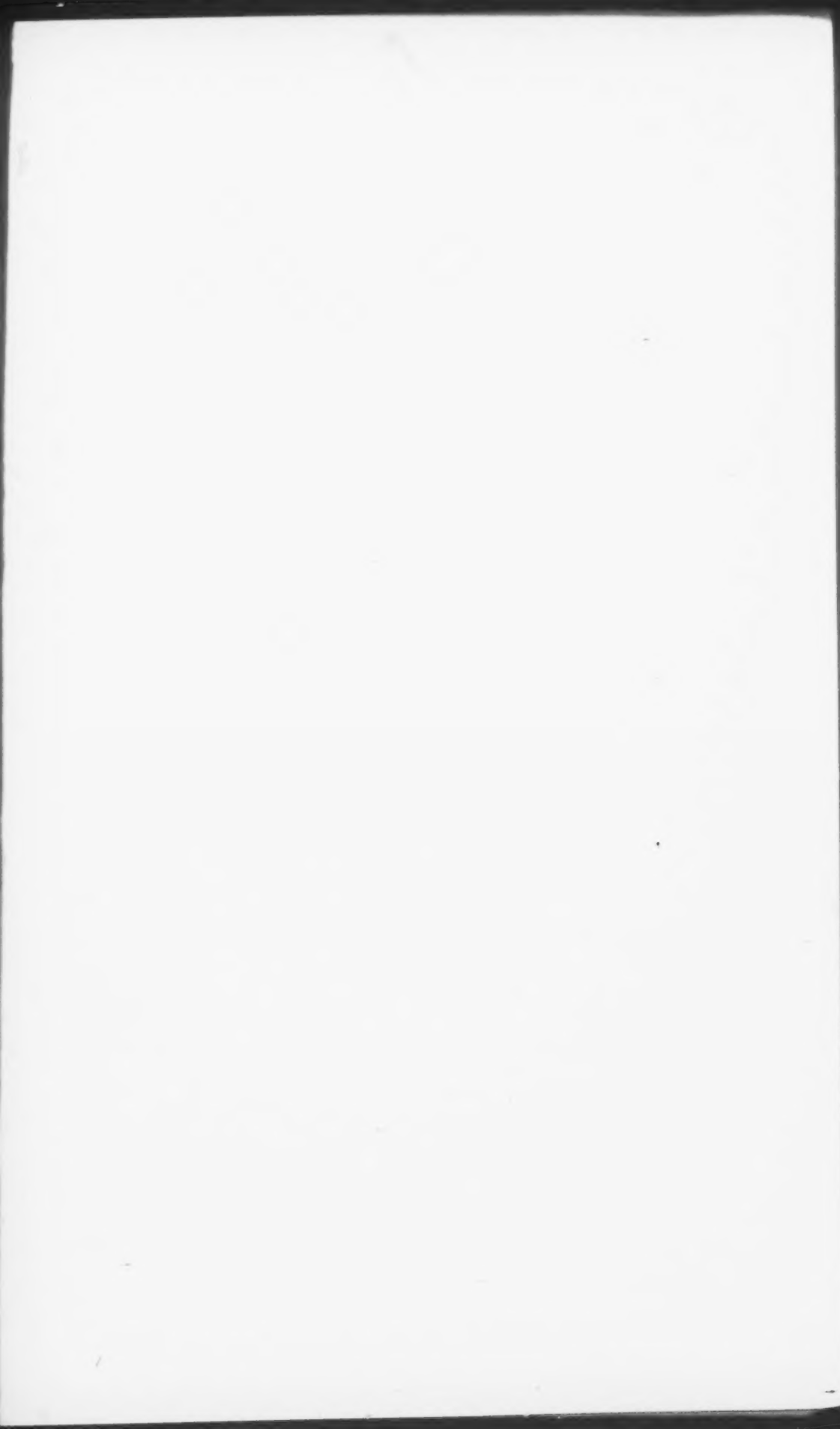
* 22 The Court is reminded that although Petitioner's case involved a classic case of a "judgment void on its face", when she moved for a Summary Reversal and Stay, she was not only summarily denied any relief, but she was actually threatened with further sanctions by two more Ninth Circuit judges!! (A. p. 222) So disdainful were they of Petitioner's action, they then also sought to deny her any oral argument (A. p. 232)

judicial misconduct (as presented herein).
Not only would this Petitioner then have her
deserved day in court, but our so-called
"constitutional guarantees" will not be mere
theories and ideals.

Respectfully submitted,



Patricia M. Bourke



FILED
FEB. 6, 1990
CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Patricia M. Bourke,)
)
Plaintiff-Appellant) No.88-2446
)
v-)
)D.C. No.
Jeanne Schuman; William Gibbs;)CV-87-5134-JPV
David Himmelman, and DOES I-X.)
)MEMORANDUM*
Defendants-Appellees.)
)

Appeal from the United States District
Court for the Northern District of California
John P. Vukasin, Jr., District Judge
Presiding

Argued and Submitted December 13, 1989
San Francisco, California

Before: Wright, Hug, and Leavy, Circuit
Judges

I.

Patricia Bourke, an attorney appearing
pro se, appeals the district court's
dismissal of her action as frivolous and

* This disposition is not appropriate for
publication and may not be cited to or by the
courts of this circuit except as provided by
9th Cir. R. 36-3.

harassing under Fed. R. Civ. P. 11, and the imposition of Rule 11 sanctions in the amount of \$5,000. Bourke sued her former employee, Jeanne Schuman, Schuman's present employer, David Himmelman, and Schuman's attorney, William Gibbs, under 42 U.S.C. Sec. 1983 for alleged constitutional wrongs connected with an earlier state court proceeding. We affirm.

II.

Rule 11 prohibits "frivolous filings" and using "judicial procedures as a weapon for person or economic harassment." Zaldivar v. City of Los Angeles, 780 F. 2d 823, 830 (9th Cir. 1986). The district court dismissed Bourke's complaint as "frivolous" and also found that Bourke was "simply trying to harass and vex the defendants" and that the court system (was) being used improperly." The district court thus relied upon both the "frivolousness" clause and the "improper purpose" clause of Rule 11. See id.

To determine whether a filing is

frivolous or made for an improper purpose in violation of Rule 11, an objective standard of reasonableness is applied. Hudson v. Moore Business Forms, Inc., 836 F. 2d 1156, 1159 (9th Cir. 1987). With frivolousness, the key question is whether the pleading states an arguable claim--not whether the pleader is correct in her perception of the law. *Id.*

A. Frivolousness

We find that Bourke could not state an arguable claim because the district court had no subject matter jurisdiction to review the state court's decisions. A federal district court, as a court of original jurisdiction, has no authority to review the final determinations of a state court in judicial proceedings. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Worldwide Church of God v. McNair, 805 F. 2d 888, 890 (9th Cir. 1986). This doctrine applies even when the challenge to the state court decision involves alleged deprivations

of due process or equal protection. Feldman, 460 U.S. at 484-85.

The federal action is an impermissible appeal from the state court decision if the constitutional claims presented to the district court are "inextricably intertwined" with the state decision. McNair, 805 F. 2d at 892 (quoting Feldman, 460 U.S. at 483-84 n. 16). Federal constitutional issues are inextricably intertwined with the state court judgment if the district court could not evaluate the plaintiff's constitutional claims conducting a review of the state court determinations. *Id.*

1 Bourke alleged six claims for relief under 42 U.S.C. Sec. 1983. Specifically, Bourke alleged: (1) that the state arbitration award was void because the arbitrator lacked subject matter jurisdiction and deprived her of her property without due process; (2) that the arbitrator made "gross legal errors" violating her right to due process, and that his award of punitive

damages to Schuman on the defamation claim violated Bourke's First Amendment rights because her statements were "truthful;" (3) that defendants's continued opposition to Bourke's attempts to vacate the arbitrator's award caused her injury; (4) that defendants "engaged in a conspiracy to deprive (Bourke) of her civil rights" by opposing her attempts to vacate the arbitrator's award; (5) that she was denied "equal protection of the laws by reason of gender;" (6) and that the state appellate division's imposition of \$2,500 sanctions was erroneous.

As to her first two claims, the district court could not determine whether Bourke was denied due process without first reviewing the arbitrator's decision or those of the myriad state courts upholding the arbitrator's decision. Similarly, as to her sixth claim, the federal court could not decide that the state appellate division erroneously imposed sanctions without directly reviewing that court's decision.

These claims are inextricably intertwined with the state court decision and the district court therefore had no subject matter to decide them. 1/ See McNair, 805 F. 2d at 892.

Bourke's third and fourth claims are also deficient. Bourke cannot state a constitutional violation based on the defendants' opposition to her attempts to vacate the arbitrator's decision. See Dooley v. Reiss, 736 F. 2d 1392, 1394-95 (9th Cir.)(because plaintiffs were not prevented from pursuing relief in a civil action, they suffered no deprivation based on defendants' attempts to conceal evidence in that litigation), cert denied, 469 U.S. 1038 (1984).

*1 Indeed, as relief, Bourke sought a judgment declaring the arbitrator's award "void by reason of a lack of subject matter jurisdiction," and a vacation of the \$2,500 sanction imposed by the state appellate division. Such requests provide strong indication that Bourke is asking the federal court to act as an appellate court for decisions by the state courts. This the federal court cannot do. See McNair, 805 F. 2d at 892.

Finally, while the basis for Bourke's equal protection claim is unclear, it appears that Bourke is asserting that she was denied equal protection either because (sic) the arbitrator's decision, or the defendants' opposition to her attempts to overturn that decision, were motivated by gender-based animus. In either case, to the extent Bourke has requested the district court to scrutinize the arbitrator's decision in her case, the district court lacked subject matter jurisdiction. See Allah v. Superior Court of the State of California, Los Angeles County, 871 F. 2d 887, 891 (9th Cir. 1989).

The proper court in which to obtain review of state court determinations is the United States Supreme Court. 28 U.S.C. 1257; McNair, 805 F. 2d at 890. The Supreme Court has already denied certiorari in this case.

B. Improper Purpose

The district court also correctly determined that Bourke's complaint was filed for an improper purpose. "Harassment under

Rule 11 focuses upon the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed by the signer's opponent." Zaldivar, 780 F. 2d 832. Thus, conduct forming the basis of the charge of harassment "must do more than bother, annoy or vex the complaining party " Id. at 831-32.

A claim of harassment may be sustained on the basis of successive filings if the same parties are involved in the successive claim and the same issues were resolved in the earlier action. Id. at 834. In addition, the absence of any support for the amount of damages claimed may be an indication of "bad faith". See Bright v. Bechtel Petroleum (780 F. 2d 766, 772 n. 8 (9th Cir. 1986)). Applying these standards, the district court correctly concluded that Bourke's complaint was filed for an improper purpose.

Here, Bourke's federal action is in large part successive. Schuman was a party

in both the state and federal actions and a number of Bourke's claims were resolved in the state courts. See Zaldivar, 780 F. 2d at 832. In addition, Bourke's prayer for relief, in which she requested \$1.05 million compensatory and \$600,000 punitive damages to compensate her for paying a \$14,500 judgment, is a strong indication of the retaliatory and bad faith nature of this action. See Bright, 780 F. 2d at 772 n. 8.

III.

Once a Rule 11 violation has been found, sanctions are mandatory. Golden Eagle Distrib. Corp. v. Burroughs Corp. 801 F. 2d. 1531, 1540 (9th Cir. 1986). The district court has wide discretion in determining the appropriate sanction for a Rule 11 violation. Id. at 1538.

Given the troubling history of this case, the fact that Bourke has been sanctioned for bringing similar claims in the state courts and yet continues to attempt to litigate them, the district court did not

abuse its discretion in imposing \$5,000 sanctions against Bourke.

IV.

Although we affirm the district court on other grounds, we address Bourke's arguments with the hope of finally ending this litigation. First, Bourke's section 1983 claims are frivolous because she has not shown that the defendants acted under color of state law. See Tower v. Glover, 467 U.S. 914, 920 (1984). Private individuals are not subject to suit under section 1983 unless engaged in a conspiracy with public officials. *Id.* Although Schuman, Gibbs and Himmelman are attorneys, they are private persons for the purposes of section 1983. See Polk County v. Dodson 454 U.S. 312, 325 (1981). Moreover, to prove conspiracy under section 1983, an agreement or meeting of the minds to violate the plaintiff's constitutional rights must be shown. See Woodrum v. Woodward County, 866 F. 2d 1121, 1126 (9th Cir. 1989)

Here Bourke has not alleged any facts to show that the defendants conspired with any state actors. Her complaint contains specific allegations which demonstrate that the section 1983 violation she complains of resulted not from any conspiracy between the defendants and the arbitrator, or other state officials but because the defendants "deliberately misled the courts as to the facts and law at every opportunity". The only reference to "conspiracy" she makes in the complaint involves an allegation among the defendants, not between the defendants and state officials. Thus, the express allegations of her complaint belie the existence of any conspiracy between the defendants and any state official.

Finally, the genesis of Bourke's complaint is that the arbitrator used letters against Bourke that Bourke herself had submitted into evidence. Bourke presents a technical argument that the arbitrator improperly used this evidence against her,

since defendant-Schuman did not move to have these letters considered in her cross-complaint. First, we note that Bourke cites no authority to support her contention that evidence cannot be used against the party who submits it. Second, Bourke's admission that she 'agreed to be a part of binding arbitration means that she agreed to abide by the rules of arbitration. An arbitrator is not bound by the formal rules of procedure and evidence. Sunshine Mining Co. v. United Steelworkers of America, 823 F. 2d 1289, 1295 (9th Cir. 1987). Thus, an arbitrator may admit and rely on evidence inadmissible under the federal rules, as long as the parties received a fundamentally fair hearing. Id. We find that Bourke received a fair hearing and even if the arbitrator did rely on letters submitted by Bourke, such reliance in no way invalidated the Arbitrator's holding.

AFFIRMED.

FILED
APR. 20, 1990
CATHY A. CATTERSON, CLERK
U. S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Patricia M. Bourke,)	
)	
Plaintiff-Appellant	,)	No.88-2446
)	
v-)	
	)	D.C. No.
Jeanne Schuman; William Gibbs;	)	CV-87-5134-JPV
David Himmelman, and DOES I-X.))	
)	
Defendants-Appellees.)	
)	

Appeal from the United States District
Court for the Northern District of California

Before: Wright, Hug, and Leavy, Circuit
Judges

The panel as constituted in the above case
has voted to deny the petition for
rehearing. Judges Hug and Leavy have voted
to reject the suggestion for a rehearing en
banc, and Judge Wright has recommended
rejection of the suggestion for rehearing en
banc.

The full court has been advised of the en
banc suggestion and no active judge of the

court has requested a vote on it. Fed. R.
App. P. 35(b).

The petition for rehearing is denied and
the suggestion for a rehearing en banc is
rejected.

FILED 3/1/88

PATRICIA M. BOURKE
Attorney at Law
P. O. Box 415
Walnut Creek, California
PH: (415) 944-4718

Attorney/Plaintiff In Pro Per

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PATRICIA M. BOURKE,)	
)	
Plaintiff,	)	No. C 87-5134 JPV
)	
vs.)	-----
)	
JEANNE SCHUMAN,	)	ORDER DENYING
WILLIAM GIBBS	)	PLAINTIFF'S MOTION FOR
DAVID HIMMELMAN,	)	TEMPORARY RESTRAINING
DOE I-X	)	ORDER, GRANTING
	)	DEFENDANT'S MOTION TO
Defendants.	)	DISMISS PURSUANT TO
	)	RULE 11, F.R.Civ. P.,
	)	REQUIRING PRE-FILING
	)	REVIEW PRIOR TO FUTURE
	)	FILINGS OF PLAINTIFF

Plaintiff's motion for a temporary restraining order and defendants' motion to dismiss and for sanctions pursuant to Rule 11, F.R.Civ. P., and for an injunction enjoining plaintiff from filing any further actions against defendants arising out of the facts of this case, came on

regularly for hearing before this Court on Feb. 25, 1988. Gregory Stout, Esquire appeared on behalf of plaintiffs. William Gibbs, Esquire, appeared on behalf of himself in prop per and on behalf of defendants Jeanne Schuman and William Himmelman. The Court has reviewed the pleadings submitted in support of and in opposition to the above motions and heard oral argument of counsel.

Because of the extraordinary history of this case and good cause appearing, IT IS HEREBY ORDERED that:

1). Plaintiff's motion for a temporary restraining order is DENIED;

2). Defendants' motion to dismiss plaintiff's complaint is GRANTED. Plaintiff's complaint is DISMISSED pursuant to Rule 11, F.R.Civ.P., as frivolous and because of plaintiff's ulterior purposes of harassment in filing this action. See Rhinehart v. Stauffer, 638 F. 2d 1169, 1171 (9th Cir., 1980);

3. Sanctions in the amount of \$5,000.00 are imposed against plaintiff Patricia M. Bourke, payable to defendants, for her violation of Rule 11, F.R.Civ.P.;

4. Plaintiff may not file any further actions against defendants herein in the United States District Court for the Northern District of California unless plaintiff's complaint is first submitted to the General Duty Judge for pre-filing review and approval

Dated: 2/1/88

J. P. Vukasin, Jr.
United States District
Judge

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Plaintiff

FILED JUNE 24, 1985

Patricia M. Bourke

Defendant

OPE # 389281

Jeanne Schuman, et. al.

AWARD OF ARBITRATOR

The undersigned arbitrator, having been duly assigned by Alameda County Superior Court, and having heard and considered the evidence of the parties in the above referenced cause on June 11, 1985, awards in full and final settlement of all claims submitted to arbitration under California Rules of Court, Rule 1615 as follows:

JUDGMENT IN FAVOR OF () PLAINTIFF

(XX)CROSS-CROSSCOMPLAINANT

AGAINST ()DEFENDANT (XX)CROSS-DEFENDANT

in the sum of \$ Fourteen Thousand Two Hundred Seventy One Dollars and eighty six cents.

0018

(See attached Memorandum of Decision)

Dated June 21, 1985

John M. True, III
Arbitrator

AWARD OF ARBITRATOR ENTERED AS JUDGMENT
IN COMPLIANCE WITH RULE 1615(c)
CALIFORNIA RULES OF COURT ON (date) July
30, 1985 in Judgment Book No. page no.

George R. Dickey, Clerk By G. King
Administrator Deputy

MEMORANDUM OF DECISION

I

Plaintiff Patricia Bourke employed
Defendant Jeanne Schuman as an associate
attorney in her law offices pursuant to an
oral contract of employment. At all
material times each was a licensed member
of the California Bar. Schuman worked for
Bourke pursuant to at least three different
employment arrangements. At first, she was

paid \$1,000.00 per month for more or less full time work. Later her compensation was changed from monthly salary to an hourly wage, again for essentially full-time work. Still later she began subletting an office from Bourke and was paid at a slightly higher hourly rate for any work she did on Bourke's cases. From the outset, even while employed "full-time" by Plaintiff, Schuman worked on some of her own cases including court-appointed criminal matters and referrals from other attorneys. Two such referrals, social security cases involving Defendants Staska and Hornof, prompted the events giving rise to this lawsuit.

The parties apparently agreed from the outset that certain cases could be "referred" by Defendant to Plaintiff's office even though Schuman was an employee of Bourke. Schuman now contends that it was agreed that any case so referred would entitle her to a referral fee of anywhere

from 25% to 33 1/3%, the exact amount or percentage to be decided on a case-by-case basis. Bourke contends, on the other hand, that only "profitable" cases would be subject to a referral fee, and that the amount and/or percentage of those fees would be decided case-by-case.

During 1980, while Schuman was employed by Bourke, two individuals, Staska and Hornof, were referred separately to Schuman by a friend. Staska and Hornof wished legal assistance in obtaining social security benefits that had been denied them. Schuman agreed to represent them and had each of them execute a retainer agreement using the form then in use in Bourke's office.^{1/}

1/ Only Staska's retainer agreement was produced at the hearing. Bourke's cause of action against Staska has been dismissed with prejudice. Hornof, who is still in the case, appeared with counsel and declined to produce any part of his file asserting attorney-client privilege. Based on all the evidence, however, it is concluded that Schuman's and Hornof's attorney-client relationship was memorialized on a form similar to that used by Staska and Schuman.

On each occasion Schuman informed Bourke that ~~she was~~ taking in those cases, and obtained her approval for doing so. She also claims that in each case she told Bourke that she would turn over any fee from the case to the Bourke office less a referral fee to be decided upon according to their agreement. Bourke, she says, agreed.

During 1980 and 1981 she processed both cases successfully and obtained fees in the amount of \$1,251.45 from the Staska case and \$628.00 from the Hornof case. These fees were paid in due course directly to Schuman by the U.S. Treasury pursuant to her petition for her statutory share of 25% of the total recovery to her clients.

The record is clear that in each instance she attempted to give Bourke these fees. Before addressing the transactions by which she made these attempts, however, the deterioration of the professional relationship between Bourke and Schuman must be described.

As of March 1, 1981, Schuman had ceased being an employee of Bourke's and had begun subletting an office from Bourke as described above. At this time although the Staska case had been finished, fees had not been awarded. It is not entirely clear if the Hornof case had been completed but no fees had been generated. Pursuant to an oral rental agreement Schuman paid Bourke \$91.00 for a furnished office including the use of a receptionist, a typewriter, copier and telephone (actual telephone and copier charges were to be reimbursed to Bourke). During March and the first part of April, 1981, she worked on her own cases and performed services for Bourke on certain cases pursuant to the employment arrangement described above. She submitted periodic vouchers for payment of these services. Although she paid rent in March, it is undisputed that she did not pay Bourke rent, in any amount, and on April 1, 1981, nor did she reimburse Bourke for telephone or copier charges.

On April 4, 1981 Bourke served Schuman with a 30-day notice to quit the office. Between that date and April 23, 1981 the two parties argued about various aspects of their situation. Bourke says that Schuman abused her privilege to use office equipment such as the typewriter and that she was not getting work done on cases as she had promised. Schuman says that Bourke interfered with her use of her leased office, with her attempts to get work done and with her clients.

On April 23, 1981, Bourke refused to pay Schuman's most recent voucher in the amount of \$305.13 for services performed. She wrote a three page ^{letter} to Schuman accusing her of failing to get work done, of having a "bad, resentful, immature attitude", of uttering "dishonest threats" and of other wrongs. She also obtained both the Staska and Hornof files and wrote to both clients asserting that Schuman was no longer in her employ and had "no further authorization or authority to represent (either of them) in

any way." She instructed her secretary to secrete the files in her (Bourke's) desk when she had finished typing the letters referred to above.

The secretary apparently neglected to do this, however, and left the files on top of her desk. Schuman happened upon the files while both Bourke and her secretary were out and discovered the actions Bourke had taken. She retrieved the files and took them to her own office.

When Bourke returned and found the files missing she went into Schuman's office where a loud argument ensued. Bourke accused Schuman of "theft" and called her a "kike" and a "bitch". She also called the Oakland Police and the California Bar Association. The police responded but declined to intervene. That afternoon Schuman reached the conclusion that she would have to leave her office. She did do in the evening after Bourke had left, moving into another office in the same building.

The following day Schuman wrote Bourke returning keys to her office. She also accused Bourke of interfering with her quiet enjoyment of her subleased space and of harassing her.

Shortly thereafter, on June 1, 1981 Schuman paid Bourke the sum of \$946.32 which represented the Staska fee of \$1,251.45 less \$305.13 which Schuman claimed Bourke owed her for the final voucher referred to above. Bourke negotiated this check, but when Schuman wrote her a second check on May 21, 1982 in the amount of \$653.00 for the entire amount of the Hornof fee (\$628.00 plus \$25.00 medical bill) Bourke returned it and the instant litigation commenced.

Between the date Schuman moved out and the date this lawsuit was served, however, Bourke pursued her perceived grievance against Schuman with what can only be described as ferocious energy. She commenced proceedings against Schuman

before the Bar Association as noted above. She wrote repeated and lengthy letters to Staska and Hornof in which she described Schuman in decidedly unflattering terms. She threatened and ultimately commenced legal action against them when they declined to cooperate with her. She conducted an extremely lengthy and voluble correspondence with the Social Security Administration which was again marked by repeated and extremely negative descriptions of Schuman. She contacted Schuman's next employer, again negatively characterizing Schuman and even threatening to sue that firm. She also called another person who she apparently thought might be interested in employing Schuman and volunteered the information that "she could not in all good conscience give (Ms. Schuman) a good recommendation." She even wrote to congressional representatives including uncomplimentary characterizations of Schuman. The record herein contains at

least fifteen separate pieces of correspondence from Bourke to someone other than Schuman, each one containing at least one severely derogatory comment about Schuman. "Spiteful," "impudent," "arrogant," "childish," "little embezzler," "thief," and "blackmailer" are but a few examples of Bourke's descriptive terminology. As another example, in an April 28, 1981 letter to Social Security Administration she made, among many, many other assertions, the statement that "That young woman attorney is absolutely uncollectible and owns barely the clothes on her back."

II

ISSUES

Bourke filed a complaint against Schuman, Staska, and Hornof. Against Schuman she complained of:

- 1). Wrongful interference with her (Bourke's) contractual relationship with Staska and Hornof;

- 2). Breach of Contract (apparently both the oral sublease and the oral agreement as to the Staska and Hornof fees);
- 3). Conversion of the Staska and Hornof fees and files.

Against Staska and Hornof she complained of "willfully and deliberately assisting" Schuman in converting money belonging to Plaintiff.

Schuman cross-complained against Bourke for:

- 1). Breach of the oral agreement to pay a referral fee on the Staska case;
- 2). Breach of the oral agreement to pay a referral fee on the Hornof case;
- 3). Breach of the oral contract of employment;
- 4). Defamation; and
- 5). Intentional infliction of emotional distress.

Each party has asked for damages based on the wrongs complained of and each has submitted some proof in respect to damages claimed.

III

DISCUSSION

None of Bourke's claims against Schuman based on the Hornof and Staska cases survives scrutiny. Moreover, her pursuit of Schuman and the fees bears all the indicia of a personal vendetta out of all proportion to the amounts in dispute. In the considered opinion of the undersigned, she has used this forum, as she has every other available to her, to vent her spleen against Schuman in a fashion which reflects dismally on her status as a legal practitioner. The award herein reflects, among other things, the profound sense of outrage felt by the undersigned at the intemperate, unwarranted, and relentlessly hostile attacks conducted by Bourke on literally every person connected with this unfortunate episode. The spectacle of elderly social security pensioners being dragged as defendants into a bitter wrangle over a few hundred dollars in attorney fees

is one of the most disheartening imaginable to anyone who believes that the law is to be used for mankind's betterment.

1. Bourke's Claims

It is found that Schuman did not, as Bourke contends, wrongfully interfere with any attorney-client relationship between Bourke and Staska or Hornof. None existed. Both clients so informed Bourke when she asked. Mr. Hornof testified repeatedly at this hearing that "Jeanne Schuman is my lawyer", and that he wanted nothing to do with Bourke. Indeed, Bourke never had anything to do with either his or Staska's case. She freely admitted that she knew nothing of the law governing their claims and that she never even met Staska. Under the circumstances it cannot be found that Bourke had any contractual relationship with Staska or Hornof to be interfered with.

It is similarly clear that Schuman did not breach her agreement to give Bourke the

fees owing on the Staska and Hornof cases. Nor did she convert the fees to her own use. She did attempt to claim that she was owed part of the fees as a referral bonus, but manifestly desisted in that endeavor prior to being sued. Staska's fees were paid and accepted by Bourke even with the deduction for Schuman's final payment for services to Bourke's cases.² The Hornof fees³ were tendered but rejected.

2/Bourke claims that, because of poor quality of Schuman's work in the relevant period, she had no obligation to pay the voucher and Schuman's withholding of the voucher amount from the Staska check was wrongful. Bourke's proof in this regard was wholly unconvincing.

3/Schuman wrote an endorsement on her check to Bourke for the Hornof fees in an apparent attempt to bring the dispute to resolution. Bourke claimed that this "restrictive endorsement" entitled her to reject the tender. This claim is undermined by 1) the circumstance that Bourke had already prepared and was ready to serve this lawsuit (indeed she returned the check with the summons and complaint), and 2) her admission at the hearing that she could, and would have negotiated the particular check introduced in evidence, but that, somehow, Schuman had substituted

Bourke's claim that Schuman, aided by Staska and Hornof, converted the client files must fail as well. It is abundantly clear that the actual attorney-client relationship existed between Schuman on the one hand and Staska and Hornof on the other. Schuman met and worked with the client, made the appearances and did whatever else was necessary to secure their benefits. Bourke had no interest in the cases or relationship to the clients. As defendants correctly point out, the actual case files ultimately belong to the clients and it is they who have the right to determine their disposition. Schuman had an obligation to ensure that Bourke got her share of the fees from those cases, and she fulfilled that obligation. Bourke's claim to an interest in the actual client files, boiled down to essence, amounts to an ---

3* contd. for purposes of this litigation another check with less restrictive language on it for the one actually sent to her. The assertion is based on nothing more than her after-the-fact conjecture and falls of its own weight.

assertion of a property interest in the paper generated in the cases that has virtually no meaning outside of her vendetta against Schuman. It would be standing the law on its head to find merit in it.

In light of the above finding, Bourke's cause of action against Staska and Hornof for "assisting" in the alleged conversion of their own files deserves no further comment.

The question of whether Schuman breached a duty owed to Bourke as a tenant is a closer one. She failed to pay rent on April 1, 1981 as required. Bourke claims that she also owed copying charges amounting to \$8.00 and telephone charges amounting to \$20.00, although she failed to substantiate either claim. Schuman asserts that Bourke's conduct at various times during the month of April so interfered with her tenancy as to constitute a constructive eviction. It is found, based

on the entire record that a constructive eviction did occur but that it did not take place until April 23, 1981, the day the police were called. Bourke is thus entitled to a pro rata share of the April rent in the amount of \$470.00. Lacking proof she is entitled to nothing for either the telephone or copier charges.

2. Schuman's Cross-claims

As to Schuman's claims against Bourke, much less need be said. Her testimony that she had an agreement for referral fees in the amount of at least 25% in the Staska and Hornof cases was credible based on all the circumstances, and Bourke's denial that this arrangement existed was not credible. It is found that she is entitled to \$312.86 from the Staska case and \$157.00 from the Hornof case for a total of \$469.86.

Her contention that she had an oral contract of employment which Bourke breached is not persuasive. As of April 23, 1981, the date she moved out of her

office, she was no longer an employee of Bourke's. She did have a valid claim for the unpaid \$305.00 voucher, but she had also failed to pay the required rent, as noted above. Thus, Bourke is obligated to pay the voucher sum, and it is found that Schuman lawfully withheld that amount from the Staska fees. But it cannot be concluded, in the face of Schuman's failure to pay rent, that the expenses involved in Schuman's relocation of her offices are chargeable to Bourke.

Schuman's contention that she has been defamed and that she has been the victim of intentional infliction of emotional distress are each meritorious and will be discussed briefly. First, as noted, Bourke has written and spoken to various persons and entities repeatedly about Schuman. Each of these communications has been studied carefully, and it is found that time and time again they contain utterances which are patently untrue, gratuitous,

malicious and decidedly injurious to Schuman's reputation as an attorney. The statements quoted in Part I above are but a very few selections from an unrelenting stream of invective that goes way beyond even the most aggressive hyperbole which might be permitted an advocate. Bourke's claim that these statements were made in the course of or in preparation for litigation and therefore privileged is rejected. In the first place, many of them were made long before the litigation commenced. Second, Ms. Bourke has, by her intemperate and unjustifiable language, thoroughly abused and therefore lost the protection of any applicable privilege. Compensatory damages are awarded Schman in the amount of \$2,500.00. It is found that Bourke's actions were malicious and oppressive. Punitive damages in the amount of \$5,000 are thus awarded.

Similarly, it is abundantly clear that Bourke's behavior towards Schuman

throughout was sufficiently outrageous to constitute the tort of intentional infliction of emotional distress. Because of Bourke's conduct Schuman has had to explain herself to 1) the police, 2) the bar, 3) the Social Security Administration, 4) her clients, 5) her current employer, and 6) at least one other individual who hadn't been even thinking of employing her but who Bourke contacted anyway. She testified credibly that this caused her extreme fear, anxiety, loss of sleep, migraine headaches and other forms of severe discomfort. She is entitled to compensatory damages in the amount of \$2,000.00. Once again it is found that Bourke's actions were oppressive and malicious. The sum of \$5,000.00 in punitive damages is awarded.

AWARD

As discussed above, Bourke is entitled to the sum of \$70.00 against Schuman for rent from April 1 through April 23, 1981. Nothing is awarded on any other claim

against Schuman and nothing is awarded against either Staska or Hornof. Schuman has been holding the Hornof fee of \$628.00 in her trust account since Bourke returned it to her. Bourke is entitled to have these amounts, totalling \$698.00 set off from the amounts awarded Schuman described below.

Schuman is entitled to referral fees totalling \$469.86 on the Staska and Hornof cases. Additionally she is entitled to the \$305.00 owed on the April 22, 1981 voucher. Since she deducted that amount from the Staska payment, it need not be included here. Schuman is also awarded \$2,500 in compensatory damages plus \$5,000.00 in punitive damages in her defamation cause of action and \$2,000.00 in compensatory damages plus \$5,000.00 in punitive damages on her final cause of action.

Schuman is thus awarded a total of \$14,969.86 against which Bourke may set off \$698.00 for a net award to Schuman of \$14,271.86.

Bourke is to pay each Defendants's
costs.

Dated: June 21, 1985

s/John M. True
John M. True III
Arbitrator

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

Date: February 19, 1987 Appellate Dept.28

Hon. Benjamin Travis, P.J.
Winton McKibben, J.
Mark Eaton, J.

Jeffrey K. Jue, Deputy Clerk

PATRICIA M. BOURKE

Appellate #
1460

Appellant,

vs-

JEANNE SCHUMAN

Respondent.

NATURE OF PROCEEDINGS: Opinion

Action: 1460

Patricia M. Bourke (hereafter Bourke) filed a complaint against Jeanne Schuman (hereinafter Schuman). Schuman filed a cross-complaint against Bourke alleging five causes of action including one for defamation and one for intentional infliction of emotional distress. The matter was referred to John M. True, III, Esq. for binding arbitration. The

Arbitrator awarded Bourke \$70.00 on one claim and denied recovery on the others. Schuman was to hold \$628.00 of Bourke's money and Bourke was credited with \$698.00 off set from the amount awarded Schuman. Schuman was also awarded \$2,500 in compensatory damages plus \$5,000.00 in punitive damages on her defamation cause of action and \$2,000 in compensatory damages plus \$5,00.00 (sic) in punitive damages on her intentional infliction of emotional distress cause of action. Schuman was thus awarded a total of \$14,969.86 against Bourke which Bourke set off \$698.00 a net award to Schuman of \$14,271.86.

Bourke petitioned the Superior Court to vacate the Arbitration award and permit a trial de novo. The petition (motion) was denied. Thereafter Bourke had a hearing on a petition in Municipal Court on a petition to vacate the award and to permit a trial de novo. This petition was denied. Thereafter, Bourke petitioned for a

reconsideration of the motion. On December 6, 1985 this motion was heard and denied. Thereafter, an appeal was filed.

Bourke's notice of appeal does not specify whether the appeal is from the arbitrator's denial of her claims, the award on the Cross-Complaint, or both. Bourke did not pay the award on the Cross-Complaint. In her opening brief, Bourke stated that the appeal seeks to reverse an order denying a motion to vacate an Arbitration Award made against Appellant on a cross-complaint for defamation and the intentional infliction of emotional distress. Bourke's brief listed two issues for the court.

1. Whether Appellant had an attorney client relationship with two social security claimants.

2. Whether Respondent serviced these clients as an employee of Appellant.

On page nine of her brief, Bourke argues defamation - further gross errors of law on the face of the decision. Bourke then

argues truth, priviledge (sic) and qualified privilege. The face of the decision shows that Bourke accused Schuman of theft and called her a kike and a bitch. There were fifteen separate pieces of correspondence from Bourke to someone other than Schuman each one containing at least one severely degrogatory comment about Schuman, spiteful, imprudent, arrogant, childish, little embezzler, thief and blackmailer are but a few examples of Bourke's descriptive terminology. The decision states that the communications by Bourke contained utterances which are patently untrue, gratuitous, malicious, and decidedly injurious to Schuman's reputation as an attorney. The decision further stated that Bourke's claim that these statements were made in the course of or preperation(sic) for litigation and therfore(sic) privileged is rejected. The statements were made long before the litigation commenced. Further Bourke has by her intemperate and unjustifiable

language thoroughly abused and therefore (sic) lost the protection of any applicable privilege.

Bourke's brief states that the same communications were used as a basis for the award of damages for intentional infliction of emotional distress. The brief argues, "However, the law is quite clear that such privileges cannot be abrogated simply by a change of labels. Otherwise, the privilege accorded would be defeated."

The arbitrator found that the statements of Bourke were defamatory. Bourke has the burden of establishing the defense of truth or privilege, Civil Code 47 lists Publications which are privileged. The only possible subsection would be section 3. This section requires that the acts be done without malice. The arbitrator found that the statements went beyond the bounds of any privilege. Bourke has presented no evidence to show that statements were privileged. There is no known privilege that authorizes the language used by

Bourke. Further, the arbitrator found that some of the statements were made prior to a time when any action was pending. Some of the statements were not related to any proceeding whatsoever. The claim of privilege although alleged has not been established for all of the defamatory statements.

Sanctions for an appeal which is partially frivolous are appropriate if the frivolous claims are a significant and material part of the appeal *Maple Properties V. Harris* 158 CA 3d 997 205 Cal Rptr 532 (sic). Here the defamation claim and the claim for intentional infliction of emotional distress are severable (sic) and distinct from the other causes of action.

The question then becomes whether these two claims can be found to be frivolous when measured by an objective and subjective standard. We find that the appeal of the defamation claim and the claim for intentional infliction of emotional distress were frivolous.

The arbitrator found that Bourke had written and spoken to various persons and entities repeatedly about Schuman. He studied each of these communications and found that time and time again they contain utterances which are patently untrue, gratuitous, malicious and decidedly injurious to Schuman's reputation as an attorney. Bourke has pointed to nothing in the record upon which she basis any claim of the truth of the utterances.

The claim of privilege under Civil Code 47(3) for litigation wa also rejected by the arbitrator because the statements were made prior to the litigation and also because the statements exceeded the bounds of any applicable privilege. Bourke has pointed to nothing in the record to show anything different from these findings. No reasonable person could expect to prevail without showing some error in the record. Bourke discussed truth and privilege in the abstract and never related it to this case. The appeal of the defamation claim and the

claim of intentional infliction of emotional distress are totally and completely devoid of merit and therefore frivolous.

The arbitrator found that Bourke's actions were malicious and oppressive. This malice was further indicated by the subsequent petitions and the filing of this appeal of the defamation and intentional infliction of emotional distress. We find that the motive for filing these two appeals was an improper motive and represents a time-consuming and disruptive vie of the judicial process In Re Marraige (sic) of Flaherty 31 C. 3d 637; 183 Cal Rptr 508.

Sanctions are imposed in the sum of \$2,500.00.

Remittitur to issue.

Presiding Judge . S/Benjamin Travis

We concur: S/ Winton McKibben

S/ Mark Eaton

FILED
May 30, 1989
Court of Appeal - First Dist.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA, FIRST APPELLATE DISTRICT,
DIVISION FIVE

Patricia M. Bourke,

Petitioner,

VS-

Oakland-Piedmont Municipal
Court,

Respondent.

A043520

Alameda Sup.

Ct. No.

639042-6

Jeanne Schuman,

Real Party in Interest /
/

Patricia M. Bourke purports to appeal

from a superior court order partially denying
a Writ of Prohibition directed to a municipal
court. We dismiss the appeal on the ground
the order is nonappealable.

The writ petition challenged a
postjudgment municipal court contempt order
arising from Bourke's failure to pay
sanctions imposed by the appellate department

of the superior court for the prosecution of a frivolous appeal. The superior court granted the petition as to the contempt citation but denied the petition to the extent Bourke asserted that the underlying judgment was void on its face. Such an order is made nonappealable by Code of Civil Procedure section 904.1, subdivision (a)(4), which prohibits an appeal from "a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court."

Bourke contends the statutory rule against appeal is inapplicable because the underlying municipal court judgment is final, so that the writ petition did not relate to a matter "pending" in the municipal court. But the writ petition related to enforcement of the sanctions order by the appellate department of the superior court, and the

matter of such enforcement is still pending in that sanctions remain unpaid.

Bourke could have challenged the order by petition to this court for an extraordinary writ. (Code Civ. Proc., Sec. 904.1, subd. (a)(4).) She has not done so, and we decline to treat the appeal as a writ petition (see Heldt v. Municipal Court (1985) 163 CA 3d 532, 534, fn.1), since the substantive arguments asserted by Bourke are patently meritless.

The appeal is dismissed.

s/ King, J.

We concur:

s/Low, P. J.

s/Haning, J.

MUNICIPAL COURT FOR THE OAKLAND-PIEDMONT
JUDICIAL DISTRICT, COUNTY OF ALAMEDA,
STATE OF CALIFORNIA

BOURKE,) No. 389281
Plaintiff,)
)
vs-)
) Minutes
SCHUMAN, et al)
)
Defendants.)
)

Department #2 Hon. Lewis P. May, Judge

Case called for trial - Jury

Plaintiff appearing: Bourke: Attorney Linda
Chester, and Pro Per

Defendant(s) appearing: Shuman (sic),
Attorney Gibbs and pro per

Hornof: Attorney G. R. Wright

Staska: Attorney S. W. Blackfield

Motion of defense counsel for defendant Staska
to abate action be and is granted and for
withdrawal of attorney.

Pursuant to stipulation all parties
present, the Court orders matter submitted to
binding arbitration.

Minutes of Nov. 5, 1984

George R. Dickey, Clerk-Administrator

By: M. Clark - Deputy Clerk.

(Proof of Service Omitted)

Patricia M. Bourke
Attorney at Law
6572 Lucas Ave.
Oakland, Ca.

William Gibbs, Esq.
449 15th St. Ste.406
Oakland, Ca. 94612

Robert W. Brower, Esq.
400 Webster St. Suite 200
Oakland, Ca.

John M. True, III
625 Third Street
San Francisco, Ca.

MUNICIPAL COURT FOR THE OAKLAND-PIEDMONT
JUDICIAL DISTRICT, COUNTY OF ALAMEDA, STATE
OF CALIFORNIA .

Bourke

Plaintiff(s)

No. 389281

Schuman, et al

Minutes
Minute Order

Defendant(s)

Department: 14

Judge: Roderic Duncan

Cause Called for Plaintiff: Patricia Bourke
appearing by attorney R. W. Brower

Defendant appearing by attorney W. Gibbs

Court Reporter Renee Dayce

It is ordered that the Petition of Plaintiff
to vacate Arbitration Award be and is DENIED.

Minutes of Nov. 7 1985

Entered on Nov. 7 1985

George R. Dickey, Clerk

By s/ G. Sabella
Deputy Clerk

(proof of service omitted)

0053

Patricia M. Bourke
Attorney at Law
6572 Lucas Ave.
Oakland, Ca.

William Gibbs, Esq.
449 15th St. Ste. 406
Oakland, Ca. 94612

MUNICIPAL COURT FOR THE OAKLAND-PIEDMONT
JUDICIAL DISTRICT, COUNTY OF ALAMEDA, STATE
OF CALIFORNIA

Bourke

Plaintiff(s)

No. 389281

Schuman, et al

Minutes
Minute Order

Defendant(s)

Department: 14

Judge: Roderic Duncan

Cause Called for Motion for Reconsideration
etc.

Plaintiff Patricia Bourke appearing

Defendant appearing by attorney W. Gibbs

Court Reporter Dana LaTrielle

It is ordered that the motion of
Plaintiff for reconsideration/renewal
of motion to vacate Arbitration Award
be and is DENIED

Minutes of Dec. 8 1985

Entered on Dec. 8 1985

George R. Dickey, Clerk
By s/ G. Sabella

(Proof of Service Omitted)

0054

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

Date: 8/25/86 Hon. Benjamin Travis, P.J.
 Winton McKibben, J.
 Mark Eaton, J.

Patricia M. Bourke

v-

Jeanne Schuman,

No. 1460
Muni. #
389281

Deputy Clerk: Charlene Goff
Appellate Dept: 28

Nature of Proceedings: Appeal on Judgment

In the above entitled action oral argument
presented, the court orders the case
affirmed. 3-0 Remittitur to issue.

The Court further orders the matter set
for hearing 10-17-86 at 2:00 pm in the
Appellate Department of this court. The
hearing is to determine if sanctions
should be imposed pursuant to CCP 907;
Briefs should be filed by 9-30-86.

(proof of service omitted)

0055

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

Date: 9/25/86 Hon. Benjamin Travis, P.J.

Deputy Clerk Jeffrey K. Jue

Appellate Dept. 28

Patricia M. Bourke

v-

Jeanne Schuman

No. 1460

Nature of Proceedings: Petition for Rehearing
And Request for Certification to District
Court of Appeal

In the above entitled case appellant's
request for rehearing is denied as will as
request for certification to the district
court of appeals.

Rehearing denied 3 to 0

Certification denied 3 to 0

Copies of this minute order mailed this
date to:

Richard Jones	William Gibbs
Patricia M. Bourke	1955 Mountain Blvd.
Attorney at Law	Oakland, Ca. 94611
286 Santa Clara Ave.	
Oakland, Ca.	

0056

COURT OF APPEAL IN AND FOR
FIRST APPELLATE DISTRICT
DIVISION FIVE

(Filed 10/29/86)

PATRICIA M. BOURKE,

Petitioner,

A036655

vs.

SUPERIOR COURT OF ALAMEDA COUNTY,

Respondent,

JEANNE SCHUMAN,

Real Party in Interest.

BY THE COURT

The petition for writ certiorari
is denied

dated: Oct. 29, 1986

s/ Low, P.J.

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
1ST DISTRICT, DIVISION 5, NO. A036655
IN THE SUPREME COURT OF THE STATE OF
CALIFORNIA

IN BANK (Filed 12/17/86)

BOURKE, Petitioner,

v.

SUPERIOR COURT OF THE COUNTY OF
ALAMEDA, Respondent; JEANNE
SCHUMAN, Real Party In Interest.

Broussard, J., DID NOT PARTICIPATE

Petition for Review Denied.

Bird

Chief Justice

0058

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

Date: 4/6/87 Hon. Winton McKibben, P. J.
 Hon. Alice Sullivan
 Hon. Richard Bartalini

Deputy Clerk Jeffrey J. Jue

Appellate Dept. 28

Patricia M. Bourke

No. 1460

v.

Jeanne Schuman

Nature of Proceedings:

Motion for Reconsideration of Sanctions
C.C.P. 1008

In the above entitled matter Appellant's
motion for reconsideration of sanctions is
denied.

Copies of this minute order mailed this
date to:

Patricia M. Bourke
Attorney at Law
P. O. Box 415
Walnut Creek, California
94596

William Gibbs
1955 Mountain
Oakland, Ca. 94611

0059

COURT OF APPEAL IN AND FOR
FIRST APPELLATE DISTRICT
DIVISION FIVE

(Filed 5/8/87)

PATRICIA M. BOURKE,

Petitioner,

A038393

Alameda No. 1460

vs.

SUPERIOR COURT OF ALAMEDA COUNTY,

Respondent,

JEANNE SCHUMAN,

Real Party in Interest.

BY THE COURT

The petition for writ certiorari
is denied

Dated: May 8, 1987

s/ Low, P.J.

*(Before Low, P.J., King, J. and Haning, J.)

89-158

No. _____

Supreme Court, U.S.
FILED

JUL 19 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM 1990

PATRICIA M. BOURKE,

Petitioner

V.

Jeanne Schuman
William Gibbs
David Himmelman,

Respondents

PETITION FOR WRIT OF CERTIORARI
TO ISSUE TO
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Part II of Appendix

Patricia M. Bourke
Attorney at Law
P.O. Box 415
Walnut Creek, California
94596
PH. (415) 944-4718
Attorney in Pro Per
Counsel of Record

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

June 1, 1987

M. Jeanne M. Schuman
Office of William Gibbs
1955 Mountain Blvd.
Oakland, California

Re: Patricia M. Bourke/
v. Jeanne Schuman
No. 86-1653

Dear Ms. Schuman:

The Court today entered the following
order in the above entitled case:

The petition for a writ of certiorari is
denied.

Very truly yours,

Joseph F. Spaniol, Clerk

0061

FILED JUN. 22, 1984

OAKLAND-PIEDMONT MUNICIPAL COURT
COUNTY OF ALAMEDA, STATE OF CALIFORNIA

Patricia M. Bourke,)	
)	
Plaintiff)	
vs-)	
	)	No. 389281
Jeanne Schuman, et al)	
)	
Defendants.	)	AMENDED CROSS-
	)	COMPLAINT FOR
	)	DAMAGES
)	
Related Cross-Action)	
)	

IN THE FIRST TWO CAUSES OF ACTION SCHUMAN CLAIMED TO HAVE BEEN "EMPLOYED" BY BOURKE UNDER AN ORAL AGREEMENT AND ENTITLED TO A "REFERRAL FEE" ON BOTH SOCIAL SECURITY CASES. THE THIRD CAUSE OF ACTION CLAIMED BREACH OF CONTRACT RELATIVE TO HER LATER OFFICE TENANCY. THE FOLLOWING ARE THE FOURTH AND FIFTH CAUSES OF ACTION SET FORTH IN SCHUMAN'S AMENDED CROSS-COMPLAINT WHICH ARE THE CAUSES OF ACTION CONCERNED WITH HER ALLEGATIONS OF DEFAMATION AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

FOURTH CAUSE OF ACTION
DEFAMATION

37. Cross-Complainant Schuman incorporates by reference paragraphs 1-7; 9-16; 19-28.

38. Schuman is ignorant of the true names and capacities of Cross-Defendants sued herein as Does I through X inclusive, and therefore sues these Cross-Defendants by such fictitious

names. Schuman will amend this complaint to reallege their true names and capacities when ascertained. Schuman is informed and believes and therefore alleges that each of the fictitiously named Cross-Defendants are responsible in some manner for the occurrences herein alleged and that Schuman's damages as herein alleged were proximately caused by their conduct.

39. Cross-Defendants, Doe I through X, at all times herein mentioned were the agents and employees of their co-cross-defendant Patricia Bourke and in doing the things herein alleged were acting within the course and scope of such agency and with the permission and consent of their co-cross-defendant.

40. At all times herein mentioned, Schuman has resided and maintained her occupation in the City of Oakland, and for five years has enjoyed a good reputation both generally and in her occupation as an attorney.

41. That on or about May 19, 1981, Schuman was offered a full-time attorney position with the law offices of Mintz, Giller, Himmelman &

Mintz and has been employed since June 1, 1981 as an associate of said firm.

42. On or about May 26, 1981, Bourke, Does I through X, published a letter to David A. Himmelman of the law firm of Mintz, Giller, Himmelman & Mintz, which stated in part "...I am cognizant of the possibility that inasmuch as Ms. Schuman left my employ under very adverse circumstances, she may have invented, twisted or exaggerated "her" remarks for her own spiteful purposes." A copy of said letter is attached hereto as Exhibit A1 and incorporated by reference.

43. Said letter was received by the law firm of Mintz, Giller, Himmelman & Mintz on May 27, 1981.

44. On or about October 20, 1981, Bourke, Does I through X, again published a letter to David Himmelman of the Law Firm of Mintz, Giller, Himmelman & Mintz which stated in part that Schuman "forcibly took files from (her) secretary" which necessitated calling the police, made misrepresentations to clients, was terminated from Bourke's office and improperly used firm money. Said letter is

attached hereto as Exhibit A2 and incorporated by reference.

45. That Bourke, Does I through X, published the following series of letters to Schuman's client Jean Staska which stated in part that:

(a) April 23, 1981 letter - "cross-complainant had been assigned by (cross-defendant) to undertake Mrs. Staska's representation and has no further authorization or authority to represent you in any way.." The foregoing is only an excerpt of said letter which is attached hereto as Exhibit B1 and incorporated by reference.

(b) April 29, 1981 letter - that Schuman has been both "indiscreet and unprofessional", "unethical and improper", terminated by Bourke for undisclosed reasons, "been acting against the interests of the firm for some time", "empty", "childish", and "spiteful". Bourke further stated that Schuman "virtually stole (Ms. Staska's) file and the file of another social security case which necessitated calling the police "who were satisfied after I showed them my records, the files, in fact,

belong to the firm." The foregoing are only excerpts from said letter which is attached hereto as Exhibit B2 and incorporated by reference.

(c) September 10, 1981 letter - that Schuman "took out of the (attorney fees in Staska matter) what she liked and sent the rest by a check which bounced. She is now making threats to take money from the other social security check which involves another case. In the meantime, even though they admit that I was employing attorney, SSI sent me a letter saying they would tell me nothing..." "Ms. Schuman stole your file.." The foregoing are only excerpts from said letter which is attached hereto as Exhibit B3 and incorporated by reference.

(d) September 23, 1981 letter - that Schuman was "cheating her employer". The foregoing is only an excerpt from said letter which is attached hereto as Exhibit B4 and incorporated by reference.

46. That Bourke published the following series of letters to Schuman's client William

Hornof which stated in part that:

(a) April 23, 1981 letter - Schuman "...had been assigned by (cross-defendant) to undertake (Mr. Hornof's) representation and has no further authorization or authority to represent you in any way.." The foregoing is only an excerpt of said letter which is attached hereto as Exhibit C1 and incorporated by reference.

(b) September 9, 1981 - Schuman was terminated by Bourke "for not giving good quality service to clients on a regular basis" and "did not properly handle files" and that Schuman has "shown herself to be vicious and dishonest", "spiteful" and "stealing fees from her" and that Schuman "was taking fees which were not rightfully hers". The foregoing are only excerpts of said letter which is attached hereto as Exhibit C2 and incorporated by reference.

47. Each and every one of the foregoing statements contained in paragraphs 42, 44, 45, 46 are false as they apply to Schuman.

48. That at all times herein mentioned each and every publication contained in Paragraphs 42, 44, 45, and 46 was unsolicited.

49. Each such statements and letters contained in Paragraphs 42, 44, 45 and 46 are libelous on its face. It clearly exposes Schuman to hatred, contempt and ridicule because said language accuses Schuman of criminal acts and being dishonest in her profession.

50. On information and belief, it is alleged that Bourke and Does I through X made the foregoing statements to members of the Bar of California including those particular letters which were sent and read by partners of the firm of Mintz, Giller, Himmelman & Mintz.

51. As a proximate result of the above described publications, Schuman has suffered loss of her reputation as an attorney, shame, mortification, and hurt feelings all to her general damage.

52. Said letters addressed to Mintz, Giller, Himmelman & Mintz, Staska and Hornof

(Exhibits A-C), did additionally contain information regarding Schuman's private affairs.

53. That the aforementioned statements were made by cross-defendants with an evil motive and malice, willful and wrongfully with the intent to injure, disgrace, gain an unfair business advantage and to defame Schuman with wonton and reckless disregard for the truth or falsity of statements made. Furthermore, any such statements were made by cross-defendants with more intensity than justified by the facts surrounding the dispute with Schuman.

54. As a proximate result of each and every publication described herein, Schuman has suffered loss of her reputation, shame, mortification and hurt feelings all to her general damage.

55. That cross-defendants's actions were intentional, reckless, oppressive, outrageous, malicious and were done with the intent to harm Schuman in her professional reputation and general health. Therefore, Schuman requests punitive damages against Cross-

Defendants in the sum of \$15,000.00.

WHEREFORE, Cross-complainant Schuman prays for judgment against Cross-Defendants as hereinafter set forth.

FIFTH CAUSE OF ACTION INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

56. Cross-complainant Schuman incorporates by reference paragraphs 1-55 of this complaint.

57. That as set forth hereinabove, Bourke (1) breached contracts with Schuman; (2) made untrue and defamatory statements to clients, employers, and members of the legal community about Schuman, and (3) published private materials about Schuman to Schuman's clients and employers. That in addition, on April 23, 1981, (4) Bourke and Does I through X called police and requested that they arrest Schuman on false charges of theft and (5) prevented Schuman from use of her office. Furthermore, said cross-defendants (6) contacted Schuman's employers at a time when Schuman had terminated her employee/employer relationship with Bourke with acrimony and Schuman's future with her

new employers had not yet become secure.

58. That at all times herein mentioned all statements made by Bourke to the police, Schuman, clients, employers and members of the bar were unsolicited.

59. that the aforementioned statements and acts by Bourke were intentionally done/made by Bourke with evil motive and malice, willful and wrongful and with the intent to injure, disgrace, gain an unfair business advantage and to defame the Cross-complainant Schuman and in particular, were intended to cause Schuman great emotional distress, worry and shock to her nervous system.

60. That as a proximate result of the aforementioned acts/statements by Bourke, Schuman was caused to worry about losing her job and reputation in the legal community which did result in Schuman suffering severe shock to the nervous system and mental distress.

61. That said Bourke's actions were intentional, reckless, oppressive, outrageous and malicious and were done with the intent to

harm Schuman of which results said Bourke was cognizant would be likely. Therefore, Schuman requests punitive damages against cross-defendants in the sum of \$15,000.00.

(PRAYERS OMITTED)

s/ William D. Gibbs

Dated: June 22, 1984

LAW OFFICES OF

PATRICIA M. BOURKE
JEANNE M. SCHUMAN
SALLY A. SKLAR

PATRICIA M. BOURKE

438 - 14th STREET
CENTRAL BUILDING, SUITE 315
OAKLAND, CALIFORNIA 94612

AREA CODE 415
(OFC.) 485-9441
(RES.) 339-9708

April 23, 1981

William Hornof
4444 Sargent Ave.
Castro Valley, Ca. Re: Social Security Claim

Dear Mr. Hornof:

This letter is written to advise you that my associate, Jeanne Schuman who was assigned by me to undertake your representation in connection with the Social Security Claim(s) is no longer in my employ, and accordingly has no further authorization or authority to represent you in any way.

If you have further need for services or questions about this matter, please feel free to communicate with my office.

Sincerely,

Patricia M. Bourke

Exhibit C1

0073

PATRICIA M. BOURKE
JEANNE M. SCHUMAN
SALLY A. SKLAR

LAW OFFICES OF
PATRICIA M. BOURKE
436 - 14th STREET
CENTRAL BUILDING, SUITE 315
OAKLAND, CALIFORNIA 94612

AREA CODE 415
(OFC.) 485-9441
(RES.) 339-9705

May 26, 1981

David A. Himmelman
Mintz, Giller Himmelman and Mintz
A Legal Corporation
405 14th Street
Oakland, California

Dear Mr. Himmelman:

It is my understanding that you have recently hired Jeanne Schuman as a new associate in your firm. She imparted this information in a recent telephone conversation with my associate, at which time she also chose to make remarks to the affect that you had deliberately not called me for a reference because you were aware of my reputation and that you fully understood why she (Jeanne Schuman) had had problems in trying to deal with me!

At the time of hearing this, I was not even sure who you were. I could not recall even ever having had a case with you. Upon

Exhibit "A"

0074

looking up your picture in a bar directory, I vaguely recall cordially speaking to you on occasion in court. However, I certainly had no negative recollections of any encounter with you which could have provoked such derogatory remarks about me. Consequently, I am left totally baffled.

As any experienced attorney is fully aware, we often encounter one another in an adversarial context with the occasional, attendant unpleasant circumstances, and sometimes we are resultantly left with bad feelings about one another. However, I am particularly disturbed to learn that I have apparently made an enemy and cannot even recall the context or situation. If I have offended you in some way in the past, I would appreciate hearing from you as to why and how so that I might make an appropriate apology.

In the meantime, I am cognizant of the possibility that inasmuch as Ms. Schuman left my employ under very adverse

circumstances, she may have invented, twisted or exaggerated your remarks for her own spiteful purposes. If that were the case, then I believe that you ought to know of her misuse of your name and of her attempt to provoke bad feelings. I would appreciate hearing from you regarding these matters. Feel free to call me at your convenience.

Sincerely,

Patricia M. Bourke

PATRICIA M. BOURKE
JEANNE M. SCHUMAN
SALLY A. SKLAR

LAW OFFICES OF
PATRICIA M. BOURKE
438 - 14th STREET
CENTRAL BUILDING, SUITE 315
OAKLAND, CALIFORNIA 94612

AREA CODE 415
(OFC.) 485-9441
(RES.) 330-9706

October 20, 1981

David Himmelman, Esq.
405 14th Street
Oakland, California

Re: Jeanne Schuman

Dear Mr. Himmelman:

Events subsequent to our last communications relative to the referenced individual have made it necessary for me to communicate with you again. Since I have no knowledge as to the details of Jeanne Schuman's employment with you, there is a possibility that you and your firm may be a necessary party in litigation with I will shortly be filing against Ms. Schuman. Consequently, rather than naming your office as a co-defendant, I thought it expedient to first inquire as to whether or not your firm is in any manner involved in the activities undertaken by Ms. Schuman since she entered your employ.

Exhibit A1

0077

If Ms. Schuman is a full-time associate with your firm, with no independent practice, then it would seem that you as her employer are a necessary party to litigation I will be filing. The dispute between myself and Ms. Schuman (and possibly you as her principal) involve two Social Security cases wherein Ms. Schuman represented the clients as my associate. Upon leaving my employ, she forcibly took both files from my secretary making it necessary for us to call the police. She thereupon contacted both clients and made statements and representations that she and not the firm was their attorney. Shortly after being terminated by me, she procured a written statement from one client (based upon her own misrepresentations) that he was not a client of the firm and that she and not I was entitled to the files. She took the fee from the one case, endorsed and negotiated the check and thereafter paid me what she considered my share of the fee by a check

which bounced twice. In making her computations she failed and refused to pay rent on a small office I had rented to her after discharging her as my associate. In effect, she took firm money and applied it as she saw fit...after apparently having made use of it for some as yet undisclosed period of time. I am informed and believe that as a result of the adverse claims made by her, my firm has never received the fee on the one case although the work was completed and the application for attorney fees filed last Fall. Whether she has also taken this fee, I do not know.

Because I cannot believe that you would condone, much less be involved in such activities, I am writing you about the matter before naming you as a co-defendant. I do not wish my complaint to be demurrable by reason of having omitted a necessary party.

Additionally, I am mindful of the very real possibility that you may hear a

distorted version of what occurred between Ms. Schuman and myself, particularly after she has been served with the litigation. Consequently, I wish to set the record straight as to what evidence I have that Ms. Schuman has acted improperly and that these clients were clients of my firm. The items of evidence are as follows:

1). I have her time record in her own handwriting where she computes the hours spent on the two (specifically named clients) and then on that basis computes how much I owe her for the pay period. I have several such documents, if you are interested in seeing them let me know.

2). I have a cancelled check where the physician report for one client was paid from my account.

3). I have her letter to me attempting to account for the fee paid to her on the one case and enclosing a check for the bulk of the fee. Why would she have found it necessary to pay the bulk of the fee to me if it were her client?

4). My former associate and my former secretary are prepared to testify under oath to various conversations where Ms. Schuman clearly acknowledged that the specific clients were mine.

5). In the case of one of these clients she filled out the Application for Fees characterizing herself as an associate of mine. Also the files she took from my office contain copy after copy of correspondence on my letterhead showing her as an associate.

6). All Ms. Schuman had to substantiate her claims is her own naked assertion and a statement signed by the client shortly after she was terminated from my office which states he thought she was his attorney and that she could have the files.

Having apparently communicated with my clients after being terminated from my firm without my knowledge or consent, she now presumes to characterize them as her own. Does she do this as a representative of your firm? Recently, she has also sent me a

* letter threatening me with State Bar complaint if I contact "her" clients. Does she do this as a representative of your firm? She did this on your stationery, hence it is possible that your firm is involved in this controversy.

As an attorney associated in what appears on your letterhead to be a firm, I am sure you realize that this sort of conduct cannot be tolerated or condoned. It is my intention to pursue this matter through all available channels including the State Bar. Hopefully, Jeanne Schuman is taking these actions entirely on her own and without any association with your firm. Consequently, I would ask that you communicate with me relative to your and/or your firm's involvement, if any.

Please also bear in mind that upon your request, I will provide your with any documentation mentioned in this letter to prove whose clients those were. Jeanne Schuman was promised no part of any fee

involved and she was fully paid for all services rendered. If she tells you to the contrary, I trust you will give me the opportunity to demonstrate the true facts are otherwise.

Sincerely,

Patricia M. Bourke

AREA CODE 415
(OFC.) 485-9441
(RES.) 339-9706

0084

LAW OFFICES OF

PATRICIA M. BOURKE

JEANNE M. SCHUMAN

SALLY A. SKLAR

PATRICIA M. BOURKE

438 - 14th STREET

CENTRAL BUILDING, SUITE 315

OAKLAND, CALIFORNIA 94612

AREA CODE 415

(OFC.) 485-9441

(RES.) 339-9706

April 29, 1981

Mrs. Jean P. Staska

22838 Alice Street

Hayward, Ca. 94541

Re: Jeanne Schuman
and Soc. Sec.

Dear Mrs. Staska:

You will have already received a letter from my office relative to your representation and the fact that Jeanne Schuman was no longer employed with me. Since then, I have received information to the affect that Ms. Schuman had taken it upon herself to contact you. I am informed that as a result of something you were told that you were "horrified" at what I was doing!!

While it is highly unusual for attorneys to involve clients in intra office disputes, it appears that Ms. Schuman has been both indiscreet and unprofessional

Exhibit B2

0085

enough to do so thereby making it necessary to defend myself and to explain a few things to you.

In the first place, the ordinary person has had little experience with attorney's offices generally, and consequently has little understanding of how law firms operate with respect to other attorneys who work for them. The typical situation involves a client being referred either to the firm generally or to an attorney with a firm. Even if the person is referred to a specific attorney in a firm this would result in that person dealing nearly exclusively with that attorney. That attorney would sign all papers, would meet with the client and would establish an attorney/client relationship with him or her along with attendant rapport. Typically, the client may rarely if ever see the owners of the firm who are, in effect, the employer of the attorney who deals with the client. However, in this context, it is in no way proper for the attorney representing the

client to impart the idea that the attorney is representing the client in his/her individual capacity as separate and apart from the firm. Occasionally, younger attorneys who are overly ambitious take advantage of the situation and seek to alienate the client from the firm with the thought of one day taking the client for their own when and if they separate from the firm.

Although you may have had little experience with the intricacies of the operation of a law office, I would assume at one time or another you hired someone to do something for you. In so doing, I am sure you had a right to expect that the person would do the job for which they were hired and that they would do nothing against your interests while working for you. While one is employed by another it would seem that this expectation ought to be the very least one could expect. This situation is even more intensified when professional, supposedly ethical persons are involved. By

the same token, it is the responsibility of the owner of a law office to see to it that attorneys employed by him/her perform their jobs in a competent and timely manner. When an attorney ceases to so function, the client's welfare is endangered and the attorney must be terminated.

At all times Jeanne Schuman represented you, she was employed and paid by me. If she ever gave you any impression to the contrary, then all I ask is for you to review the time sheets which are attached showing the hours charged to me on your behalf. Therefore, if she has told you anything different from this she has acted unethically and improperly and demonstrates one among many reasons why she is no longer to be employed by me. I am sure your experience with her was friendly and satisfactory, however, your matter was able to be concluded in a relatively short time with a minimum of technical matters to attend to. Hence, I hope you will keep this fact in mind when you evaluate her and my

relation to her. On the other hand, I worked with her over a year and was able to observe her functioning in many different situation. Obviously, it is not appropriate for me to go into any details or to further explain my reasons for terminating her as my associate.

I am also concerned about another episode which Jeanne Schuman called to my attention when we spoke about your matter. I recall an occasion when you were in my office regarding a Will and I happened in and spoke a few words attempting to assist both you and Jeanne. Jeanne now tells me (attempting to hurt me) that you resented my coming into the room and wondered who I was and who I thought I was!! If you actually said something like that, then I must conclude that Jeanne Schuman has been acting against the interests of the firm for sometime, and that she must have deliberately given you the impression that I was some sort of an "interloper" rather than her employer and your attorney.

Unfortunately, the situation now existing between Ms. Schuman and myself is not limited to unpleasant words. Undoubtedly because of bureaucratic delays, my office has not been paid anything whatever for handling your case. Our fees were to have been sent to us by the Social Security Administration weeks ago. Contrary to our relationship and in an attempt to force me to forego certain sums Ms. Schuman owes me, she threatened to lay claim to all or part of the fees I have waited so long to receive. I am not particularly concerned about this aspect of the matter since I have numerous documents most in her own handwriting which demonstrate quite clearly that she performed all the services for you as my associate. Her attempt to lay such a claim is childish at best. However, aside from such threats, she came into my suite today and virtually stole your file and the file of another social security case right out from the desk of my secretary. When my secretary demanded that she return the

files, she declined! This act is likewise an empty, childish, spiteful gesture inasmuch as the entitlement to the fees is a question of fact and has nothing whatever to do with whom may have the files at the moment. However, as I am sure most people can understand, one cannot permit another person to take things which do not belong to them. When Ms. Schuman responded to our request for a return of the files, we were met with impudence and arrogance and more threats. I called the police who were satisfied after I showed them my records that the files, in fact, belonged to the firm. They took no action immediately, however inasmuch as they first wished to consult with the District Attorney's Office before pressing charges.

Having to write a client such a letter is necessarily disconcerting and embarrassing to me. This places me in the awkward position of having to communicate with a virtual stranger whom believes that her real attorney was Ms. Schuman. No

doubt, you feel loyalty and concern for her. However, I do hope you will keep an open mind, and realize that you may have been proceeding with an inaccurate impression of what was occurring. You may be assured that had Ms. Schuman remained discreet and acted properly in this matter, I would not have found it necessary to in any way involve a client in office problems. Certainly, we all try to hire people to work for us who are compatible and discerning..sometimes it just doesn't work out like we plan.

My purpose has never been to hurt Ms. Schuman. But, I obviously cannot tolerate the inaccurate statements she has made nor can I permit the removal of files and documents from my offices which do not belong to her. I would certainly be willing to speak with you further about this matter if you wish. Since I believe the services to be rendered in your matter have been concluded for sometime, it is unlikely that you would be faced with any choices or decisions in the near future. However, you

could hardly expect me not to defend myself or to fail to bring the dispute regarding your file to your attention. At this point, I just ask that you reserve judgment and that you make no further statements which encourage Ms. Schuman in the impudent course of action she has chosen to undertake.

Sincerely,

Patricia M. Bourke

PATRICIA M. BOURKE
JEANNE M. SCHUMAN
SALLY A. SKLAR

LAW OFFICES OF
PATRICIA M. BOURKE
438 - 14th STREET
CENTRAL BUILDING, SUITE 315
OAKLAND, CALIFORNIA 94612

AREA CODE 415
(OFC.) 485-9441
(RES.) 328-9708

September 10, 1981

Mrs. Jean Staska
22838 Alice Street
Hayward, Ca. 94541

Dear Mrs. Staska:

Unfortunately, I find it necessary to write to you again. This comes about as a result of things which have happened since I last wrote. In spite of my notice to Social Security, they paid the entire attorney fee to Ms. Schuman. She took out of the fee what she liked and sent me the rest by a check which bounced! She is now making threats to take money from the other Social Security check which involves another case. In the meantime, even though they admit that I was the employing attorney Social Security has just sent me another letter (after a five month delay where I heard nothing) saying they would tell me nothing (dates, amounts

Exhibit B3

(0001)

sent etc.) because only Jeanne Schuman's name appeared on the papers. They cite the "Privacy Act" as a basis for making this refusal. Apparently, they are protecting the privacy of the client. This is indeed an odd interpretation of law when one considers that they are apparently in the same breath acknowledging that Jeanne Schuman was working for my firm when she performed the services in question!!

Consequently, because of the lack of cooperation from Social Security it appears that I will have to file suit in Federal Court naming you and the other client as defendants as well as Social Security so as to be entitled to the money due my firm and so as to be able to obtain the necessary information. However, I am told that if the client signs an authorization for me to get the information, that this may be sufficient.

In order that you be brought up to date on recent events and that you may fully understand what occurred between Ms. Schuman

and myself, I am sending you a letter which I have just prepared to send to the other Social Security claimant whose fees have never been received. I am also sending you a copy of the response from Social Security to show you how and why they refused to assist me in any way.

I am also enclosing the authorizations for you to sign to permit me to obtain the necessary information and to retrieve the files from Ms. Schuman.

Because Ms. Schuman stole your file without my knowledge or consent, I do not have your telephone number which I understand is unlisted. Hence, I am severely handicapped in communicating with you. I had hoped you would have called me when I wrote to you last April. I sent you the time records at that time which ought to have demonstrated that Ms. Schuman charged me for the time she spent on her case. Surely, you do not condone her taking any part of the attorney fee besides her salary?

Please send back the authorizations

signed by you as soon as possible. My purpose is not to upset you or to cause you undue concern. However, I have no control over Ms. Schuman's behavior, and unless I obtain client cooperation, I have no choice but to rely on the courts to protect myself especially when I have received such an uncooperative and totally bureaucratic reply from Social Security.

I also ask that you call me on receipt of this letter, giving me your phone number should further need arise to contact you.

Sincerely,

Patricia M. Bourke

AREA CODE 415
(OFC.) 485-9441
(RES.) 339-9708

0098

said to you?

I suspect you have not returned the papers to me because you "don't want to get involved". In acting in this manner, you are not only increasing the chances of my having to involve you in a lawsuit, but you are greatly increasing the amount of work and time I must spend to protect myself. My firm was never fully paid for the services we expended for you. I have no knowledge whether the amount Ms. Schuman claimed to have received was correct, nor do I know WHEN she received it. If you bothered to review the materials I sent you, it ought to have been clear that in all likelihood, Jeanne Schuman was only an employee of my office when she represented you. Does it not seem only fair then that I not be put to an inordinant amunt of trouble to learn the basic facts about what fees were paid? These are simply matters of common sense and right and wrong. Surely, you are not attempting to assist Jeanne Schuman to cheat her employer! If Jeanne Schuman is innocent

of any wrong-doing with respect to your case or your file then she ought not to object to my obtaining such simple, basic information. If you wish Jeanne to have your file, then the proper, professional method to accomplish this is to allow me to retrieve it, make what photos I need and return it to you...you may then do with it as you choose. Associate attorneys are never permitted to "snatch" files out of the employing attorneys office as she did.

Certainly, if you are troubled by my request and wish to speak with me, I have told you several times to call me. You do not call. Yet you do not respond to my letters. Do not make it necessary for me to sue anyone about this matter...please do as I ask, or at least, call me so we can discuss this matter further. The request I made is a simple one and one which fairness and right requires that you consent to IF you are interested in doing right.

Sincerely,

Patricia M. Bourke

LAW OFFICES OF

PATRICIA M. BOURKE
JEANNE M. SCHUMAN
SALLY A. SKLAR

PATRICIA M. BOURKE

438 - 14TH STREET
CENTRAL BUILDING, SUITE 315
OAKLAND, CALIFORNIA 94612

AREA CODE 415
(OFC.) 485-9441
(RES.) 339-9705

April 23, 1981

William Hornof
4444 Sargent Ave.
Castro Valley, Ca. Re: Social Security Claim

Dear Mr. Hornof:

This letter is written to advise you that my associate, Jeanne Schuman who was assigned by me to undertake your representation in connection with the Social Security Claim(s) is no longer in my employ, and accordingly has no further authorization or authority to represent you in any way.

If you have further need for services or questions about this matter, please feel free to communicate with my office.

Sincerely,

Patricia M. Bourke

Exhibit C1

0101

PATRICIA M. BOURKE
JEANNE M. SCHUMAN
SALLY A. SKLAR

LAW OFFICES OF
PATRICIA M. BOURKE
438 - 14th STREET
CENTRAL BUILDING, SUITE 315
OAKLAND, CALIFORNIA 94612

AREA CODE 415
(OFC.) 485-9441
(RES.) 338-9708

September 9, 1981

Mr. William Hornof
4444 Sargent Ave.
Castro Valley, Ca. 94546

Dear Mr. Hornof:

Thank you so much for talking to me by phone regarding the problems I am having with Jeanne Schuman and with Social Security. I realize that your only contact with my office was through Ms. Schuman and that you were probably on good terms with her and felt kindly toward her. On the other hand, having had no personal contact with me, you would not be readily disposed to accept the things I was forced to reveal to you. You must realize that no practicing attorney likes to have to involve her clients in any unpleasantness which involves other counsel who were employed by her.

Exhibit C2

0102

PATRICIA M. BOURKE
JEANNE M. SCHUMAN
SALLY A. SKLAR

LAW OFFICES OF
PATRICIA M. BOURKE
438 - 14th STREET
CENTRAL BUILDING, SUITE 315
OAKLAND, CALIFORNIA 94612

AREA CODE 415
(OFC) 485-9441
(RES.) 339-9705

September 9, 1981

Mr. William Hornof
4444 Sargent Ave.
Castro Valley, Ca. 94546

Dear Mr. Hornof:

Thank you so much for talking to me by phone regarding the problems I am having with Jeanne Schuman and with Social Security. I realize that your only contact with my office was through Ms. Schuman and that you were probably on good terms with her and felt kindly toward her. On the other hand, having had no personal contact with me, you would not be readily disposed to accept the things I was forced to reveal to you. You must realize that no practicing attorney likes to have to involve her clients in any unpleasantness which involves other counsel who were employed by her.

Exhibit C2

0103

Consequently, it is with much embarrassment and regret that I find myself having to not only tell you these things, but to attempt to enlist your cooperation. However, as you will hopefully understand after reading this letter, I was really left with little other choice.

Ms. Schuman at all times while working on your case was an employee of my office. She was paid on a weekly basis a salary which paid her in full for all services she performed for you. In order that you need not just take my word for this fact, I am enclosing copies of her time records wherein she would show me what she did each week for each client and the amount of time spent. I would, in turn, pay her a check for the time based upon these time records. Another woman attorney worked for me on the same basis during the time in question and has assured me that she would testify that Jeanne Schuman was only an employee and was entitled to no part of the fee which was to have been paid by Social Security on your

behalf. I also have a cancelled check wherein we paid for your physician's report off of my checking account. I will enclose a copy of the check if I can locate it before this letter is mailed.

About the same time she was working on your Social Security claim, another claim was also being processed (Staska) by her. Both these claims were being handled on the same financial basis with Jeanne Schuman being paid a salary and any fee paid by Social Security belonging only to my firm.

As I am sure you are aware based upon your own experience, sometimes employees just do not work out and do not always perform satisfactorily. This became increasingly true of Ms. Schuman during the latter part of 1980 and early 1981. Up to that time our relations has always been cordial. Obviously, as the primary attorney in the office and her employer, I must terminate her if she is not giving good quality service to the clients on a regular basis. However, rather than fire her, I

told her I would rent her an office next to mine and would permit her to conclude the services needed on several pending cases with all new cases to be handled by others. Finally, and during March, April 1981 it appeared that she was not even properly handling the few cases I had left her to do. I asked her to move out of my offices entirely and to return all the files.

It was then for the first time that Ms. Schuman showed herself to be vicious and dishonest. She presented her final pay voucher to me and demanded payment. She owed me a month's rent, she owed for having used my copy equipment on her own cases, she owed a phone bill (I having generously allowed her to use my phones for her own cases), and I genuinely believed she was charging me (spitefully) for more time than she had actually spent on a couple of items. I told her ALL claims I had must be settled at the same time and that I would pay her only the balance due her after deducting for the rent which she owed me. She angrily and

defiantly refused saying that I was to pay her all I owed her and she would pay the rent "later". When I refused, she told me that she would then lay claim to BOTH the fees from your case and from the Staska case and that inasmuch as she had signed the papers as the official "attorney" Social Security would pay her instead of me!! She also claimed that I had agreed to pay her some sort of commission on the Social Security cases (an outright lie). So, I asked her just how much was it I was supposed to have agreed to. She replied "...well, I guess the amount of the rent".

Immediately after hearing these threats, I made numerous telephone calls to Social Security to try to protect myself. I was given several addresses back East where the attorney fees are paid from. I immediately wrote to them and informed them that no fees were to be paid to Ms. Schuman and that if they did not want to pay me, the fees should be held so that I could satisfy them that I was the person entitled. This occurred in

April 1981. In June I received a letter from Ms. Schuman enclosing a check for \$946.32. She had in spite of the notice I gave Social Security received the fees from the Staska case, had deducted every cent she claimed I owed her, paid nothing for rent, and you will note THREATENED TO HANDLE THE HORNOF FEES IN THE SAME MANNER!!! When I attempted to cash her check, it bounced (letter from her bank enclosed)! Hence, it is clear that Ms. Schuman admits the fees belonged to my office, but she apparently intends to receive them and to take out just as much as she pleases! Even though I was eventually able to negotiate her check, it is also clear that she was using my money and paying it over to me when she pleased.

At this point, you can imagine my total dismay at Social Security for having disregarded my notice. It also occurred to me that she just might have received the Staska fees long before any dispute arose and had been using my money all along without informing me. Consequently, I again wrote

to Social Security (none of my letters having been answered) and asked whether the Hornof money had been sent to her, what amount was sent, and when it was sent. I also asked the same questions relative to the Staska money inasmuch as I am otherwise left to trust in what she tells me about the amount she had received. To the extent she received the fees and did not pay them over to me, it would seem that the fees would be continue to be owed by the client, by Social Security or by both. This is especially apt to be the case if the checks were sent to her AFTER my letters notifying them were received.

After some five month^s, I received the enclosed reply from Social Security which in effect told me nothing. They refused to say whether any other money had or would be disbursed to her, they refused to tell me when the Staska money had been disbursed or the amount, and they claimed the "Privacy Act" prevented them doing so. You will also note that they acknowledge in the same

breath that Ms. Schuman was a "member of my firm"! Consequently, I believe that Mr. Cooper just does not know the law, but he is doing all he can to get rid of me and my problem. Unless, I can obtain the necessary information through the cooperation of the clients involved, I will be left with no choice but to file suit in Federal Court naming both clients, Ms. Schuman and Social Security. As I understand it if the clients sign an 'authorization' then the Privacy Act cited by Mr. Cooper is waived and I can determine just what she has done to me. Rather than attempting to resolve this matter and to do what is right, Social Security has intensified the problem and has caused me to have to write to you. Unfortunately, this sort of response I have found all too typical of civil service.

You should also know that before Ms. Schuman left my offices, she saw the Hornof and Staska filed laying on my secretary's—desk and snatched them away from her! The police were called when she refused to

return them, but they refused to do anything because she claimed to the police she had some sort of right to them. She also told us that the clients had told her it was alright to take them! Hence, the police refused to cite her for theft and advised me to file suit against her. Files such as those belong to the firm and to the client. They are by no means the property of the attorney who just happened to work on them IF that attorney was working on them as an employee. This is just the same as for example an engineer working on a project as an employee of General Motors...he has no right to take such things home and claim them...this is theft. The client may have his/her files, but only after the attorney who represented them (in this case my firm) has had an opportunity to take photo-copies of documents they may need. Obviously, Ms. Schuman deliberately accorded me no such opportunity since she wished to handicap my ability to reach you or to protecy myself.

In order to try to avoid the need for

suit being filed, I ask at this time that you sign the enclosed authorizations filling in your Social Security number where indicated. This way, I can determine whether any attorney fees arising from your matter have been disbursed to her, the amount sent to her, and WHEN it was sent. I will need the same information relative to the Staska claim. Only after I have received this sort of information can I determine what to do next about these matters.

Even though you may not wish to "take sides" or "become involved" it hopefully ought to be clear to you that I am rightfully entitled to, at least, know these details. If someone were stealing from you, you would hardly want them to get away with it. Your signing these authorizations will save me a lot of time and effort, and could do away with the possibility that you will be named in a suit which I will have to file in Federal Court if the necessary information and money cannot otherwise be

obtained. Your signing the authorization does not mean that you are siding with me, it only acknowledges that I ought to be able to obtain the necessary information about money which is rightfully owed me.

I am also including a statement whereby you direct Ms. Schuman to return your file to my office which I assure it belongs. If you then want your file yourself, all I ask is that you permit me to photo some of the documents in it. If you then wish Ms. Schuman to have, it would be appropriate for YOU to give it to her. It was in no way proper for her to steal it like she did.

If you have not returned the documents to me in ten days, I will have to assume that you are deliberately trying to assist Ms. Schuman to take fees which are not rightfully hers. I am enclosing a return envelope for your use. I am sure you will understand the problem I face if you do not cooperate. Feel free to call and discuss this if you wish.

Sincerely,
Patricia M. Bourke

Patricia M. Bourke
Attorney at Law
6572 Lucas Ave.
Oakland, California
PH: 339-9705

ENDORSED FILED
7/23/85

Attorney In Pro Per

SUPERIOR COURT OF THE STATE OF CALIFORNIA,

COUNTY OF ALAMEDA **

Patricia M. Bourke,	/	
	/	
Plaintiff,	/	No. 601138-3
	/	
vs-	/	DECLARATION OF
	/	CROSS-DEFENDANT
Jeanne Schuman,	/	IN SUPPORT OF
	/	PETITION TO
	/	VACATE
Defendant.	/	ARBITRATION
	/	AWARD

I, Patricia M. Bourke, declare and could testify to the following of my own personal knowledge under oath:

BACKGROUND FACTS - NO SUBSTANTIAL DISPUTE

The following facts were adduced at the Arbitration hearing, and except to the extent indicated involved no substantial controversy:

1). The clients Staska and Hornof were initially referred to Schuman by a friend of hers.

** The motion was initially filed under a new number in Superior Court due to confusion over the court rules. The motion was transferred to municipal court for disposition.

2). I was operating my law offices as a single proprietorship, I was not incorporated, nor was there ever any allegation made by anyone that Schuman had any sort of partnership interest. Schuman was at all times mentioned a full-time employee of mine.

3). She had some limited right to have a small practice of her own. However, apart from her intermittently using my office facilities, these matters were maintained separate and apart from me and my own clients.

4). There was no prior course of dealing between Schuman and myself relative to referrals.

5). The arrangement with me relative to these clients was the same as to each of them.

6). Schuman approached me relative to making a "referral" regarding the Staska and Hornof cases. What was said or intended by this "referral" is in dispute.

7). Schuman procured Mrs. Staska to execute a "Contract for Legal Services" wherein Mrs. Staska was named as the "Client" and "Patricia M. Bourke Law Offices" was designated as

"Attorney". A "Social Security Disability Claim" was indicated to be the subject matter. It was also stated in this contract that "Attorney reserves the right to employ associate counsel at her expense..." It also stated in this contract that the attorney was entitled to retain a duplicate file upon discharge. A true and correct copy of this written contract is appended hereto as Exhibit "A" and is incorporated herein by reference as *1 though fully set forth.

8). Schuman submitted regular pay vouchers to me to account for the time she had spent, and repeatedly placed the names Staska and Hornof on these vouchers and received her pay from me for this time thusly accounted for. All the other names on the vouchers mentioned along with Staska and Hornof were clients of mine. True and correct copies of these -----

*1 I was able to obtain this "Contract for Legal Services" only because the client, Mrs. Staska died and the estate representative waived the attorney-client relationship. The Hornof counterpart is still concealed because of Schuman's claims of "attorney/client privilege, which claim of privilege the Arbitrator honored at the hearing...

vouchers are appended hereto as Exhibit "B", and each of which is in the handwriting of Ms. Schuman.

9). Schuman performed all the legal services on the two Social Security cases. I did not meet either client during the processing of these claims.

10). Throughout the processing of these Social Security cases, I paid all expenses, including the physician's report for one client, all office overhead, including Schuman's regular salary, rent, stationery, and library, etc.

11). Schuman submitted a form "Petition to Obtain Approval of Fee..." to the Social Security Administration for Staska which contained the following: "signature of Petitioner...Jeanne Schuman; Firm with which associated, if any: Law Offices of Patricia M. Bourke." A true and correct copy of this document is appended hereto as Exhibit "C".

12). During the latter part of April, 1981 when all the work on the two client's Social Security cases had been earned and requested,

but were, as yet, unpaid, a dispute erupted between myself and Schuman relative to unrelated financial matters. During this dispute, Schuman orally threatened to take the Social Security fees and claimed that the clients were "hers".

13). That same day, Schuman took both these client's case files from my secretary's desk and refused to return them.

14). Shortly thereafter, Schuman went to both clients and procured them to sign a statement prepared by her which stated that she, and not I, was their attorney in the two Social Security cases, and further that she was entitled to both the files and the fees. Schuman thereupon sent copies of these statements to Social Security to assist in inducing Social Security to send her the fees. True and correct copies of each of these statements is appended hereto as Exhibit "DI" and "DII" and are incorporated herein by reference. These statements of the clients of April, 1981, were not, however, made known to me until October, 1981.

15). Both Schuman and these clients thereupon interposed the objection of "attorney/client" privilege when I sought recovery of the files, when I sought information about their discussions about who was the attorney, when I sought documents sent to Social Security, or when I sought discovery of any matter regarding the issues herein involved. These assertions of "attorney/client" privilege were honored by the Arbitrator during the hearing and whenever I sought to question either Schuman or Mr. Hornof regarding their communications concerning the attorney/client relationship.

16). Both Staska and Hornof were unsophisticated persons with little experience in dealing with attorneys or law firms.

17). According to a letter from Social Security which was admitted into evidence, the Staska fee check had been sent to Schuman "in early May". On June 1, 1981, Schuman sent me her personal check for the major part of the Staska fee. She had received and negotiated the check from Social Security, and had

deducted and retained for herself the full
amount she had claimed in our dispute.^{*2} In
addition, she had paid nothing to me for rent
and other office-related expenses I claimed.
When I took this check to her bank on June 2,
1981, I was unable to cash it because there
was "insufficient funds" in her personal
account. A statement from her bank verifying
this fact was admitted into evidence.

18) Schuman stated in her letter which
accompanied the Staska money (letter appended
hereto as Exhibit "H" and incorporated herein
by reference) that she would treat the Hornof
fees in the same manner. Thereafter, and on
May 24, 1982, and SUBSEQUENT to my having
written all of the offending letters, she
tendered the Hornof fees to me.

THE ARBITRATOR EXCEEDED THE SCOPE OF THE
SUBMISSION: (Excerpts only)

The submission of this matter to
Arbitration occurred at my suggestion inasmuch

*2 Schuman had been discharged by me
immediately on making the threat. In the last
phase of our relationship she had sub-let an
office from me and failed to pay rent due. The
arbitrator awarded me this rent.

as there was no court available at the time set, and it appeared to me that my action on the complaint was the only viable one inasmuch as the cross-complaint referred only to two letters to her employer and certain letters to the clients. Each of these communications were subject to either a qualified or an absolute privilege, were wholly truthful, or at the very least, I had a reasonable basis to believe in their truth. Consequently, I believed that the amount in controversy was too small to warrant the time, attention or formality of a full court trial. I had prosecuted my complaint against Schuman primarily as a matter of principle inasmuch as I did not believe a practicing attorney ought to be permitted to divert funds from her employer and misrepresent her status to clients whom she had referred to me.

I believed the only matters before the Arbitrator were those framed by the Complaint and Cross-Complaint. This belief was corroborated by the fact that months before the arbitration occurred, the Arbitrator

requested copies of both the Complaint and Cross-Complaint: "so that I may familiarize myself with the issues of the case". (Letter from Arbitrator to the parties dated March 27, 1985).

It was then my intention and continued to be my intention to submit to Arbitration only the matters contained in the within Complaint and Cross-Complaint to Arbitration, and nothing else. This is what was before the Municipal Court, and I assumed that this is what would be likewise before the Arbitrator. There was never at any time any agreement or even mention of the matter submitted to the Arbitrator being of any broader scope. Certainly, it was not my intention to grant a carte blanche to an unknown Arbitrator to decide a matter where I had any real chance of being held liable for any substantial sum, let alone thousands of dollars. There simply are not enough safeguards in Arbitration, and the Arbitrators could well be young and unable to analyse the facts or law as well as a Judge. It was certainly not my intention to permit

this arbitrator to decide my liability for EIGHT OR MORE SEPARATE, DISTINCT TORTS WHICH WERE NOT PLEADED OR REFERRED TO IN ANY WAY IN THE PLEADINGS.

In point of fact, the Social Security letters referred to in the Arbitrator's decision as forming the basis for the large awards against me, were ADMITTED INTO EVIDENCE BY ME in order to demonstrate the extent of my incidental damages arising from the time I and my staff had spent as a result of the threatened conversion of the Social Security fees by Schuman.

At no time was there any offer or mention of any desire by Schuman or her attorney to amend the Cross-Complaint to state any new or different bases for her claim of defamation. At no time did he refer to these series of letters as forming the basis for anything other than what they were admitted to show (i.e. incidental damages for conversion pursuant to C.C. 3336) Had he done so, my objections could have been registered and explained.

While the "prejudice" inherent in any hearing being handled this manner is self-evident, it is important to review the operative factors so that there will be no doubt as to the surprise and grave prejudice suffered by the Cross-Defendant.

Apart from there being no agreement to submit this sort of exposure to Arbitration, I had no NOTICE and hence no opportunity to review these letters or even try to justify or explain their content. In fact, insofar as I knew, their content was not in issue ... Likewise, I had not briefed the separate line of case law relative to privilege arising from communications with administrative agencies.

In addition, and having relied that the pleadings before the Municipal Court had established the parameters of what was before the Court and the Arbitrator, I had made no attempt to make any claim against any insurance I may have, nor did I procure counsel to represent me. I did not prepare nor expect to have to defend any greatly expanded defamation case.

What nonetheless occurred here was that this Arbitrator HEARD, TRIED, AND DECIDED as many as SEVEN DISTINCT, SEPARATE, AND WHOLLY UNPLEADED TORTS, without so much as according any warning or notice to me of his intention to do so!!!

UNDERLYING CUSTOMS AND PRACTICES OF THE
LEGAL PROFESSION: (excerpts only)

When Schuman told me she wished to refer these clients to my office, she said nothing which would indicate that anything other than an outright referral was intended. She said nothing about expecting or demanding any referral fee, and I would not have agreed to pay any "referral fee" inasmuch as the cases were relatively small, marginally profitable Social Security claims.

On the other hand, Ms. Schuman testified at the Arbitration Hearing that she was "only referring the fee", and that she wanted the "normal referral fee".

Based upon my experience, a referring attorney gives up the case, the client, the files and any resulting fees. These rights

continue to reside in the attorney to whom a case is referred until there has been a formal Substitution of Attorneys. However, when I questioned Schuman on cross-examination during the Arbitration hearing as to whether she had ever actually told me at anytime prior to our dispute in April, 1981 (when all the work was done and she had already been paid by me for doing it) that these were not "my clients", her only response was that she had referred to them as "her clients" in my presence. (Appended hereto as Exhibit "E" is an excerpt from her deposition wherein her testimony on this critical issue was very similar to what she stated during the Arbitration). Consequently, and based upon her own admissions, no such clear explanation was ever given to me. If she were not referring the client, then why did she not put her own name on the Retainer Agreement (Exhibit "A")??

Having been given reasonable cause to believe that Schuman had made a normal, outright referral of both these clients to me, that belief, in turn, led me to conclude that

when Schuman interacted with these clients, she was doing so only as my agent and employee.

Should an associate working under such circumstances receive any fees, she would be legally obligated to immediately turn them over to her employer. She may not make even temporary personal use of such funds. Should the associate do so, it is my understanding, that the associate has misappropriated funds entrusted to her and has accordingly acted in a highly illegal and unethical fashion.

Consequently, when Ms. Schuman threatened to take these fees and then, in fact, exercised dominion and control over them, and also misrepresented her status to both clients (Exhibits "DI" and DII"), she was committing acts of conversion, was being dishonest and very unethical, and I felt justified in contacting the clients and others who could assist me to protect myself.

MY TESTIMONY - LETTERS TO CLIENTS
(Excerpts only)

The content of each of these letters dealt

exclusively with this dispute, both these clients were directly involved in this dispute, and everything that I told them I believed to be absolutely true.

However, in spite of my urgings and explainings the clients refused to contact me, and refused to sign an authorization for me to obtain any information from the Social Security Administration or from their files.

LETTERS TO SCHUMAN EMPLOYER (Excerpts only)

Shortly, after Schuman left my employ, I stood at my secretary's desk as she spoke to Schuman (by phone). Ms. Bryan asked her how she had been able to get employment there with Mr. Himmelman without a reference from Pat. Immediately after terminating this conversation, Ms. Bryan quoted Ms. Schuman as having told her that Mr. Himmelman had said: "He did not need any reference from her, because he knows what she is."

My sincere belief was that he did not say this about me and that Schuman had made the statement for spite. Mr. Himmelman wrote back saying that he had not made any such statement

and that there had been no adverse relationship. He so stated in his responsive letter which was put into evidence and reiterated this at the hearing.

This letter was written to one with a mutual interest and in order that any possible ill-will between us be resolved inasmuch as we practiced in the same community.

Subsequently, however Ms. Schuman wrote me several letters making threats, laying claim to the clients and the like (e.g. Exhibit "J") on stationery of Mr. Himmelman where she was indicated to be his agent/associate. I had no knowledge whether he permitted her to have any practice independent of him. Was she claiming Staska/Hornof as clients on his behalf? Were her threats regarding the fees dispute made as his agent? The statements made in that letter (Exhibit A1) were all true and the majority of them are directly corroborated by the writings involved. All the foregoing was explained to the Arbitrator.

SOCIAL SECURITY LETTERS.(Excerpts only)

Inasmuch as the Arbitrator used these

letter, in part as a basis for the large award against me even though none of these letters were pleaded, it is indicated to give a short explanation of my purpose in writing them.

When Schuman told me that she would take the Social Security fees if I did not pay her the amount(s) in dispute, I immediately wrote to Social Security to prevent this misappropriation of funds.

...I had no choice but to contact Social Security again to attempt to determine the amount of money involved, to urge that it be sent to me, and to try to obtain copies of the Petition and other documents which would corroborate that Schuman had processed these claims only as my associate.

... I was told that everything was confidential and that if I wanted information or documents I needed authorization from Schuman or the clients! Finally by June, 1981, I knew that contrary to my urgings they had sent her the Staska fee and that she had withheld it and made temporary use of it. I did not want similar intermeddling with the

Hornof check... If she had received the Hornof check, then I needed to know WHEN and in what amount so that I could sue.

TESTIMONY OF SALLY SKLAR (Excerpts only)

Mrs. Sklar was the associate who was employed along with Ms. Schuman when the operative facts herein occurred. ...it was her conclusion that both these cases were office cases, and had been told by Schuman that the cases had been referred to the office. She had never heard anything about Schuman being entitled to share the fee. She also said that while she was employed by me there were numerous occasions wherein office work was delayed by Schuman, and that great problems were caused because she did not do her work timely to meet court deadlines. She stated that such problems with Schuman existed at various times through her association with my office.

TESTIMONY OF MAUREEN BRYAN (Excerpts only)

She also recalled the incident when Schuman took the two files from her desk which made her upset because she knew I would be

mad. She also recalled a controversy in the office as to whether or not Mr. Himmelman had made an adverse remark about me, but she could not recall who it was who was supposed to have relayed the remark to us.

SCHUMAN TESTIMONY (Excerpts only)

When asked why she had placed my name on the Staska "Contract for Legal Services" during Cross-Examination at the Arbitration hearing, Schuman answered: "Because I wanted her to know who I was sharing fees with". When I asked her about the initials "JS" appearing on the document, thinking they were her initials, she said "No, I didn't sign it, those are Jean Staska's initials". She also said that she did not pay the \$91.00 rent owed to me on the first of April, 1981 because she did not have the money.

(THE FOREGOING DECLARATION WAS VERIFIED AND WHEN FILED HAD APPENDED TO IT EACH OF THE EXHIBITS DESCRIBED. THESE EXHIBITS ARE NOT APPENDED HEREIN FOR BREVITY. NO DECLARATION WAS FILED BY SCHUMAN, NOR WERE THE WITHIN RECITALS OTHERWISE CONTRA-DICTED BY HER)

OAKLAND-PIEDMONT MUNICIPAL COURT
COUNTY OF ALAMEDA, STATE OF CALIFORNIA

Patricia M. Bourke)	
)	
Plaintiff,	)	No. 389281
)	
vs-)	
	)	TRANSCRIPT OF
Jeanne Schuman, et al	)	ORAL PROCEEDINGS
	)	BEFORE HON.
Defendants.	)	RODERICK DUNCAN
	)	MOTION TO VACATE
		ARBITRATION
	)	AWARD
Related Cross-Action	)	11/7/85
)	

RAISING THE CONSTITUTIONAL ISSUE: (Excerpt
only...page 6 of transcript lines 18-24):

MR BROWER: "The law is clear, that a complaint
for defamation must state the words -- the
defamatory words -- as a matter of
constitutional due process and that absent
that, those words are not raised. They're not
an issue. And in addition, it was the Social
Security letters, as well, that are mentioned
in the memorandum as well as letters to
congressman, so --"

(p. 20 lines 19-24):

"The issue here, I think is very clear from
that memorandum -- that it was based on
nonpleaded documents and as a right of

constitutional due process of law and all--
everything we know about arbitration, how you
should not exceed the scope but this one did
and that makes the judgments thats based on it
void."

Law Offices
William D. Gibbs
1955 Mountain Blvd.
Oakland, California 94611
(415) 339-3334

FILED 9/4/87

Attorney for Defendant and
Respondent JEANNE SCHUMAN

SUPERIOR COURT OF THE STATE
OF CALIFORNIA, COUNTY OF ALAMEDA

PATRICIA M. BOURKE,)	
)	
Plaintiff and Appellant	)	No. 1460
)	
vs-)	
)	
	)	ORDER TO SHOW
JEANNE SCHUMAN, et al	)	CAUSE RE
	)	CONTEMPT
Defendant and Respondent	)	(C.C.P. 1209)
)	

To PATRICIA M. BOURKE, Plaintiff and
Appellant, herein:

YOU ARE HEREBY ORDERED to appear on
Friday October 9, 1987, at 9:00 a.m or as
soon thereafter as the matter may be heard,
in the courtroom of Appellate Division of the
above-entitled court, located at 12th and
Fallon Streets, Oakland, California, then and
there to show cause, if any you have, why you

should not be judged in contempt of court and punished accordingly for willfully disobeying the order of this court made on February 20, 1987, in the above entitled action.

The order of February 20, 1987, and your disobedience thereto are particularly described in the declaration of William D. Gibbs, which is attached hereto and made a part thereof.

It is further ordered that service by mail of a copy of this Order to Show Cause and the declaration of William D. Gibbs, Esq. on PATRICIA M. BOURKE, Esq., an attorney in pro pria personal herein, shall constitute sufficient service without personal service on the alleged contemner.

Dated: 9/4/87

s/Winton McKibben
Judge of the Superior Court

FILED 10/7/87

0137

State of California, did, by reason of the acts hereinafter described, deprive Plaintiff of the right of due process and equal protection secured by the United States Constitution.

2. All named Defendants reside in the Judicial District of the Northern California, moreover, each act and event leading to the within claims occurred in said District. Venue is therefore proper pursuant to the terms of 28 U.S.C. 1391.

3. Plaintiff has exhausted her State Remedies in that she has filed timely appeal/petitions with the Appellate Division of the Alameda County Superior Court, California District Court of Appeal, a California Supreme Court, and with the United States Supreme Court. Each said filing resulted in a "denial" from each court without opinion.

4. Defendants, and each of them, while acting under the color of laws of the State of California have deprived Plaintiff of due process of laws secured by the Fourteenth

Amendment of the United States Constitution through the following acts and events:

A. Plaintiff, an attorney licensed by the State of California filed a complaint against her former associate, Defendant, JEANNE SCHUMAN, also a licensed attorney, for conversion and for interference with advantageous relations. Defendant SCHUMAN filed an Amended Cross-Complaint against Plaintiff for defamation and the intentional infliction of emotional distress. The issues presented in said Complaint and Amended Cross-Complaint were then submitted, pursuant to stipulation to binding Judicial Arbitration, and John True, III, Esq. was duly appointed by the Alameda County Court System to hear and determine the said issues.

B. Defendant SCHUMAN'S Amended Cross-Complaint pleaded and specifically referred and appended EIGHT LETTERS of the Plaintiff which she alleged defamed her. Neither Schuman, nor any of her counsels, at any time sought or offered to amend the Amended Cross-Complaint, nor did they offer any further

allegedly defamatory material into evidence so as to try to expand the issues before said Arbitrator. Consequently, only the issues raised against Plaintiff or of which she had notice were those framed by the Amended Cross-Complaint.

C. However, in rendering his lengthy written Decision, the said Arbitrator abused his discretion and committed repeated gross judicial errors. In justifying his large award against Plaintiff under said Amended Cross-Complaint, the Arbitrator made express reference in his written decision to a total of "15 letters", and also specifically described wholly unpleaded letters (e.g. to the State Bar and to Social Security). Consequently, the face of the Arbitration Award against Plaintiff on its face showed that wholly unpleaded causes of action had been relied upon to exacerbate the damages awarded to SCHUMAN against Plaintiff, BOURKE. The Arbitrator made no allocation of damages among the said letters.

D. The decision of said Arbitrator was thereupon converted into a formal judgment against Plaintiff, Patricia Bourke by the Alameda County Municipal Court (Oakland-Piedmont-Emeryville Judicial District), and became a duly entered judgment for \$4,500.00 in compensatory damages, and \$10,000.00 in punitive damages against her personally.

E. Defendants, and each of them, thereupon opposed every attempt made by Plaintiff to have the said judgment vacated, and deliberately misled the courts as to the facts and law at every opportunity, with the result that the Courts of the State of California have refused to vacate said judgment. Meanwhile, Defendants, and each of them, have instituted collection proceedings against Plaintiff, and have filed liens against her under the color of law of the State of California.

5. In thereby rendering a decision which greatly exceeded the scope of the issues before him, the Arbitration Award and the judgment based upon said award are both void.

on their face. The within controversy therefore is one within the jurisdiction of the United States District Court pursuant to the provisions of 42 U.S.C. 1983 inasmuch as said judgment was predicated upon a lack of subject matter jurisdiction and purported to deprive Plaintiff of her property without the notice and hearing guaranteed by the Fourteenth Amendment of the United States Constitution.

6. Plaintiff therefore asks Declaratory Relief pursuant to the provisions of 28 U.S.C. 400 declaring said Judgment void by reason of a lack of subject matter jurisdiction. Plaintiff also asks for a stay of all collection proceedings pending the hearing of the within matter.

AS AND FOR A SECOND, SEPARATE AND DISTINCT CAUSE OF ACTION, PLAINTIFF ALLEGES AS FOLLOWS:

7. Plaintiff incorporates by reference paragraphs 1-6 of her First Cause of Action.

8. The said Arbitration Award was not only void on its face by reason of a lack of subject matter jurisdiction, but was on its

face predicated upon legal reasoning so insane and capricious as to amount to a mere sham. Said decision on its face contained repetitive, gross legal errors which resulted in arbitrary conclusions so diametrically opposed to elementary legal principles as to reverse liability between the parties and to thereby violate Plaintiffs rights to due process of law guaranteed by the Fourteenth Amendment of the United States Constitution. The face of said decision contained the following gross legal errors:

A. Although it was undisputed that SCHUMAN procured the clients in issue to sign a Contract for Legal Services which named Plaintiff as the "attorney", the Arbitrator expressly concluded that Plaintiff had "no connection to the case", "no attorney/client relationship", and "no contractual relationship" with that same case/client! Said Arbitrator thereupon, and on that basis, concluded that Plaintiff's statements to the contrary in her letters were untrue and hence defamatory to SCHUMAN.

B. Secondly, the reasoning contained on the face of the Arbitration Award either utterly disregarded or turned around backward the entire law of agency. The said Arbitrator expressly found that Defendant SCHUMAN had been an employee of Plaintiff when she performed the legal services in issue, and that SCHUMAN was moreover entitled to a "referral fee" for having referred the said client/case to Plaintiff. However, and in spite of said findings, the Arbitrator thereupon concluded that because Plaintiff had never met the client or done the legal work, she could not have any "attorney/client relationship"! This conclusion was likewise pivotal in finding Plaintiff liable to SCHUMAN under her Amended Cross-Complaint.

9. In thusly reversing liability, the Arbitrator did not commit "mere error", but rather rendered a judgment against Plaintiff by a decision which on its face offended reason, common sense, and was diametrically opposed to whole bodies of elementary law.

10. The combined result of the Arbitrator's insane reasoning was such as to turn Plaintiff's truthful statements regarding SCHUMAN into lies. Hence, in having assessed large compensatory and punitive damages against Plaintiff for her truthful statements, said judgment violated Plaintiff's rights of Free Speech under the First Amendment of the United States Constitution.

11. In assessing both compensatory and punitive damages for Plaintiff's letters which were each clearly within well-established privileges under California Law (C.C. 47, being communications to interested persons, and communications involving proposed litigation) said decision arbitrarily deprived Plaintiff of the benefits and immunities arising from privileges on which she had a right to rely. For this additional reason, Plaintiff has been subjected to liability contrary to due process of law.

12. Consequently, and for each of the above reasons, Plaintiff asks for a Declaratory Judgment vacating the aforesaid judgment against her.

AS AND FOR A THIRD CAUSE OF ACTION, PLAINTIFF ALLEGES AS FOLLOWS:

13. Plaintiff incorporates by reference paragraphs 1-5 of the First Cause of Action and paragraphs 8-12 of the Second Cause of Action, and paragraphs 29 and 30 of the Sixth Cause of Action.

14. By reason of the within described facts and circumstances, Plaintiff seeks a recovery of damages pursuant to the provisions of 28 U.S.C. 1343.

15. At all times mentioned Defendants JEANNE SCHUMAN, WILLIAM GIBBS, Esq., and DAVID HIMMELMAN, Esq. were attorneys of record in the Municipal Court action, and each therefore either participated directly in the activities under color of law as herein described, or alternatively were in a position to have prevented the acts and events causing damage to Plaintiff and which

deprived her of her constitutional rights as herein alleged.

16. Apart from being an attorney of record, Defendant, JEANNE SCHUMAN, was herself the Cross-Complainant and client of Defendants WILLIAM GIBBS, Esq. and DAVID HIMMELMAN, Esq., and as such, had full power and authority to have permitted the said Municipal Court Judgment against Plaintiff to have been vacated.

17. Apart from being an attorney of record, Defendant, DAVID HIMMELMAN, Esq. was the employer of JEANNE SCHUMAN during the period when Plaintiff's attempts to have the aforesaid Municipal Court judgment vacated were each opposed, and continued to be her employer during all or part of the collection activities herein alleged. Therefore, DAVID HIMMELMAN, Esq. was in a position to have prevented Plaintiff from being deprived of her constitutional rights, but repeatedly failed and refused to do so.

18. Defendant SCHUMAN and her counsels WILLIAM GIBBS, Esq. and DAVID HIMMELMAN, Esq.

have each acted fraudulently and in bad faith from the outset, in that each knew, or had reason to know that the communications complained of in said Amended Cross-Complaint they had caused to be filed were both true and protected by privilege. Moreover, Defendants, and each of them, as licensed, practicing attorneys were fully aware that the said Municipal Court judgment was void by reason of the lack of subject matter jurisdiction, and further by reason of the fact that the said judgment was the product of utterly insane reasoning and multiple gross errors of law evident right on the face of the Arbitrator's Decision as aforesaid.

19. Plaintiff therefore asks compensatory damages as follows:

A. By reason of the acts of Defendants, and each of them, in opposing the vacation of the said void judgment, Plaintiff has suffered great and extreme mental distress and physical torment commencing upon receipt of the Arbitrator's Decision in June, 1985 when she had to undertake to try to have said

judgment vacated by performing hundreds of hours of uncompensated, futile legal services while acting in pro per. Said extreme mental distress was then magnified further when she then had to suffer the humiliation, and shame involved in Defendants' collection proceedings which became known to her neighbors, family friends and associates. As a result of the foregoing, Plaintiff asks damages against Defendants, and each of them, in the amount of \$350,000 pursuant to the provisions of 28 U.S.C. 1342.

B. In undertaking to vacate said judgment against her, Plaintiff has sustained substantial out-of-pocket expenses, for which she seeks reimbursement.

C. As a direct and proximate result of the misconduct of the Defendants, and each of them, Plaintiff has paid and continues to pay and incur expenses for medications and psychological treatment in an amount to be proved at trial.

20. Said Defendants, and each of them, in doing and omitting to do the acts as

should not be assessed sanctions for having filed a "frivolous appeal".

29. Plaintiff filed opposition to said Order to Show Cause and repeated each of the grounds for her appeal as aforesaid. Defendants, appeared and asserted a right to sanctions by reason of "frivolous appeal".

30. On February 19, 1987 the Appellate Division of the Alameda County assessed Plaintiff the sum of \$2,500 pursuant to the request of Defendant, WILLIAM GIBBS, Esq. In so doing, the Appellate Division of the Alameda County Superior Court issued a written opinion which adopted and reiterated the vituperative language of the Arbitrator against Plaintiff, stated that she had offered "no evidence" of the truth of her statements, and had pointed to "no error" in the record. The decision also made reference to the fact that Plaintiff had sought recourse in higher courts. The said decision made no reference to and utterly ignored the fact that the judgement was void on its face for lack of subject matter jurisdiction as

aforesaid.

31. Plaintiff filed a timely Petition for Certiorari with the District Court of Appeal relative to said assessment of sanctions for "frivolous appeal", which said Petition was "denied" without opinion.

32. Said decision of the Appellate Division of the Alameda County Superior Court was so arbitrary as to offend reason. The appeal of a void judgment can hardly be "frivolous". Moreover, the decision blatantly misrepresented the record before the court and thereby deprived sought to deprive Plaintiff of her property contrary to due process of law.

33. Plaintiff therefore asks that the said award of sanctions be vacated pursuant to the provisions of Federal Rules of Civil Procedure 60(b)(6).

WHEREFORE, Plaintiff prays for Judgment in the First Cause of Action as follows:

1. For injunctive relief staying the enforcement of said judgment pending the hearing of the within action.

2. For Declaratory Relief nullifying the

Judgment against Plaintiff.

3. For costs of suit,

4. For such other and further relief as to the court may seem proper.

WHEREFORE, Plaintiff prays for Judgment in the Second Cause of Action as follows:

1. For injunctive relief staying the enforcement of said judgment pending the hearing of the within action.

2. For Declaratory Relief nullifying the judgment against Plaintiff.

3. For costs of suit,

4. For such other and further relief as to the court may seem proper.

WHEREFORE, Plaintiff prays for Judgment in the Third Cause of Action as follows:

1. For damages for mental suffering in the amount of \$350,000.00 against Defendants, and each of them.

2. For incidental damages according to proof;

3. For medical and related expense according to proof;

4. For punitive damages in the amount of

\$300,000.00;

5. For reasonable attorney fees.
6. For all costs of suit;
7. For such other and further relief as to the court may seem proper.

WHEREFORE, Plaintiff prays for Judgment in the Fourth Cause of Action as follows:

1. For damages for mental suffering in the amount of \$350,000.00 against Defendants, and each of them.

2. For incidental damages according to proof;

3. For medical and related expense according to proof;

4. For punitive damages in the amount of \$300,000.00;

5. For reasonable attorney fees.
6. For all costs of suit;
7. For such other and further relief as to the court may seem proper.

WHEREFORE, Plaintiff prays for Judgment in the Fifth Cause of Action as follows:

1. For damages for mental suffering in the amount of \$350,000.00 against Defendants, and each of them.

2. For incidental damages according to proof;

3. For medical and related expense according to proof;

4. For punitive damages in the amount of \$300,000.00;

5. For reasonable attorney fees.

6. For all costs of suit;

7. For such other and further relief as to the court may seem proper.

WHEREFORE, Plaintiff prays for Judgment in the Sixth Cause of Action as follows:

1. That the award of sanctions against Plaintiff for "frivolous appeal" be vacated.

2. For all costs of suit;

3. For such other and further relief as to the court may seem proper.

Patricia M. Bourke

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

Date: 1/11/88 Winton McKibben, J.
Deputy Clerk Catherine Ferber
Dept. 16

Patricia M. Bourke

v-

Jeanne Schuman, William Gibbs
and David Himmelman

Nature of Proceedings: Order to Show Cause
Re Contempt Appellate Action No. 1460

The above entitled action comes on calendar this day having been continued from October 9, 1987 for appearance of plaintiff. There being no appearance by Patricia Bourke as previously ordered, the Court now orders a bench warrant to issue for defaulting plaintiff, Patricia M. Bourke. Bail is set at \$50,000.00 cash only. Plaintiff's request for continuance received by the court on Jan. 8, 1988 is DENIED.

Respective counsel are hereby notified by a copy of this minute order mailed to the

0157

addresses below:

Gregory Stout
Attorney at Law
220 Montgomery Street,
Suite 1010
San Francisco, Ca 94104

William Gibbs
Attorney at Law
1955 Mountain Blvd.
Oakland, Ca. 94611

By: Catherine Ferber
Deputy County Clerk

GREGORY STOUT, ESQ.
Attorney at Law
220 Montgomery Street
Suite 1010
San Francisco, California 94104
Ph: (415) 398-6283

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PATRICIA M. BOURKE,)	
)	
Plaintiff,	)	No. C 87 5134 JPV
)	
vs-	)	DECLARATION IN SUPPORT
	)	OF MERITS OF MOTION
	)	FOR INJUNCTIVE RELIEF
JEANNE SCHUMAN,)	
WILLIAM GIBBS,)	
DAVID HIMMELMAN,)	
)	
Defendants.)	
)	

INTRODUCTION:

Plaintiff (hereinafter "Declarant") through this suit challenges the constitutionality of a certain Oakland-Piedmont Municipal Court judgment against her which was rendered pursuant to a binding judicial arbitration (Appendix "A"). Plaintiff alleges that this final state court judgment was predicated upon a proceeding which violated her right to

notice and hearing and which was otherwise contrary to due process of law under the Fourteenth Amendment of the United States Constitution.

The subject judgment presently exceeds \$20,000.00 (\$10,000 of which was for "punitive damages") was rendered pursuant to an Amended Cross-Complaint (Appendix "B") filed by Declarant's former associate (hereinafter called "Schuman") for alleged "defamation" and "intentional infliction of emotional distress" which allegedly arose from **EIGHT LETTERS** written by Declarant to persons directly involved in a dispute with Schuman. Each of these eight letters complained of was appended to Schuman's Amended Cross-Complaint (Appendix "B").

In appendix "A" is the eleven page decision written by the Arbitrator explaining his decision and summarizing the evidence he had relied upon in giving the award against Declarant. Upon receipt of this decision, a Declaration was thereupon prepared to accompany Declarant's Motion to Vacate filed

in the Municipal Court. (Appendix "D") Which Declaration set forth the evidence adduced in the Arbitration Hearing. Since Schuman filed no contrary Declaration, this document per Hirsch v. Ensign (1981) 122 CA 3d 389, 188 Cal Rptr 155, forms the official record of what occurred at the arbitration.

THE JUDGMENT ON ITS FACE VIOLATED THE FOURTEENTH AMENDMENT RIGHT TO NOTICE AND HEARING.

As will be established by the within Points and Authorities, the subject judgment is VOID ON ITS FACE because the court record establishes that the judgment palpably exceeded the scope of the pleadings. The Amended Cross-Complaint submitted for arbitration described and appended EIGHT LETTERS, whereas the Arbitration Award was expressly predicated upon a total of FIFTEEN LETTERS (Appendix "A" p. 5 line 10), written by Declarant in connection with Plaintiff's dispute with Schuman. Not only did the Arbitrator describe the letters he predicated his judgment upon by their number, but he

also described SEVEN WHOLLY UNPLEADED AND UNLITIGATED LETTERS" by their addressee and content as well. (See and compare Appendix "A" p. 4-6, 9-10, with Appendix "B" p. 9-16, pertinent lines being highlighted in yellow, see also the actual letters appended to "B")

Schuman at no time prior to the arbitration hearing nor at the hearing made any offer to further amend her Cross-Complaint so as to include these unpleaded letters. Likewise, at no time during the hearing did she move to have these letters included as evidence under her Amended Cross-
*1
Complaint. Consequently, Declarant had no notice that the scope of the accusations against her had been materially expanded, nor was there any opportunity to object.

*1 These additional seven unpleaded letters were admitted into evidence by Declarant under her own complaint only to demonstrate the time and effort expended in search of money and files which Schuman had converted. These letters were all written, at least, two years before the hearing and hence the one year statute of limitations (C.C.P. 340(3)) had long since run on them. Schuman had made no attempt to determine if further letters were written in that she conducted no discovery. (Appendix "D" p. 6 lines 24-28, p. 7 lines 1-9)

Declarant learned for the first time that these additional letters/causes of action were being used against her when received the decision. (Appendix "D" p. 6, lines 6-28, p. 7 lines 1-22).

THE ARBITRATOR'S AWARD ON ITS FACE ABROGATED ESTABLISHED, ELEMENTARY LEGAL PRINCIPLES AND DISREGARDED THE IMPORT OF UNREFUTED DOCUMENTARY EVIDENCE WITH THE RESULT THAT MINIMAL DUE PROCESS WAS DENIED.

There is no significant issue regarding any of the facts found by the arbitrator. His findings are essentially identical to Declarant's factual contentions. The Arbitrator was simply ignorant of the legal effect of the facts found.

FACTS:

It was undisputed that Schuman was at all pertinent times an employee of Declarant. It was further undisputed that she undertook the representation of the two Social Security claimants in question with the permission of Declarant, and that she procured each said client to execute a written retainer agreement which named declarant as their sole attorney. (Appendix "C", Appendix "A" p. 1

lines 1-15, p. 2 lines 1-9, 19-22, footnote 1, p. 3 line 1, Appendix "D" p. 2 lines 12-22, p. 12 lines 1-10) It was also undisputed that Schuman was paid by Declarant for servicing both these clients, and Declarant also paid all overhead and client expenses (Appendix "D" p. 2 lines 23-24, p. 3 lines 1-13, Appendix "A" p. 4 line 20). At the conclusion of the legal services, Schuman prepared and submitted a Petition for Attorney Fees to Social Security whereon she designated herself as having acted as Declarant's associate. (Appendix "D" p. 3 lines 13-20). Both this document as well as the Retainer Agreement were admitted into evidence at the arbitration hearing. In her Cross-Complaint Schuman sought a "standard referral fee" for these two Social Security cases. (Appendix "B" p. 3 lines 1-3, 25-26, p. 4 lines 5-7, p. 5 lines 4-7). She also sought and was awarded a "referral fee" for these cases by the arbitrator. (Appendix "A" p. 2 lines 8-9, p. 7 lines 14-16, p. 11 line 911). Schuman's only further allegation was

that she "never intended" to refer the clients, but was "only referring the fee"! She did, however admit on crossexamination that she had not explained this not explained this odd intention at the time of the referral. (Appendix "D" p. 8 lines 9-21) Months later, after the services on both Social Security cases were completed under the aforesaid arrangement, a dispute arose about an unrelated matter. Schuman claimed she could not afford to pay certain rent owed to Declarant (Appendix "A" p. 11 line 2-4, Appendix "D" p. 3 lines 20-26) and for the first time asserted a right to a credit for a "referral fee" on the Social Security cases. (Appendix "A" lines 9-14) When Declarant refused and terminated Schuman, Schuman threatened that if she could not have her way, she would take the as yet unpaid Social Security fees. (Appendix "D" p. 3 lines 20-25), Appendix "D" p. 3 lines 20-25). That same day, Schuman acted to implement her threat by seizing and refusing to return both

case files. Although the police were called to assist, they refused to intervene. (Appendix "D" p. 3 lines 27-28, Appendix "A" p. 4 lines 1-9) Shortly thereafter, she contacted both clients and procured each of them to execute a statement which stated that she, and not Declarant, was the one entitled to the Social Security fees and the files. (Appendix "D" p. 4 lines 1-11). These documents were then sent by Schuman to Social Security to induce them to divert both fees to her. These statements were also placed in evidence at the arbitration. In spite of Declarant's letters informing Social Security that Schuman's claim was false, Social Security sent both fees to Schuman. (Appendix "A" p. 2, lines 10-18, p. 4 lines 15-21, Appendix "D" p. 10 lines 19-28, p. 11 lines 1-6)(i.e. the same unpleaded letters on which the Arbitrator relied for his damage award against Declarant). (Appendix "A" p. 5 line 10, 15-16, p. 10 line 18) The first check was placed into Schuman's personal account and used by her for an undetermined

amount of time, as shown by the fact that when she later tendered a personal check to Declarant for part of the first fee, but her check bounced when Declarant initially attempted to negotiate it (Appendix "D" p. 5 lines 1-7). Schuman thereafter wrote to Declarant threatening her with State Bar action if she made further contact with "her clients", and informing Declarant that she intended to treat the next check in the same way. (Appendix "D" p. 5 lines 8-13). Since Schuman had stolen both case files, and the clients refused to cooperate in any way, Declarant had no knowledge as to the fee amounts or when or whether Schuman had received them. All the offending letters had been written before she tendered the amount she claimed was the second fee by a check bearing a restrictive endorsement. (Appendix "D" p. 5 lines 8-13)

THE LETTERS

Every letter on which the Arbitrator predicated his large award of damages was

written only to parties and entities directly involved in the controversy (clients, State Bar, Social Security), and all of the language used dealt only with the dispute. (See actual letters at end of Appendix "B") The purpose of each letter was to enlist the cooperation of the clients, inform the addressees of Declarant's claims to the fees and the files, to attempt to gain access to the documents stolen, and to use the information gotten in the suit which Declarant planned to file and did file against Schuman. Declarant wrote each letter in the good faith belief that Schuman owed her a fiduciary duty, had utterly no right to make threats, had misrepresented matters to the clients, and had then misappropriated funds belonging to Declarant. As the sole attorney named in the retainer agreement (Appendix "C"), and with no substitution of attorneys being involved, Declarant believed that as against her former associate she had the exclusive right to the fees and files. Consequently, under elementary principles of

agency law, (See Appendix "E" p. 7 lines 8-28, p. 9 lines 1-21). Declarant believed each statement she made accusing Schuman of attempting to steal and of lying (worst words used) was true. Moreover, each letter written was ABSOLUTELY PRIVILEGED for one, if not two separate reasons. (see C.C.P. 47, 2 (3), (4), and 3, Appendix "E" p. 9-12) in that each was written to prepare for litigation or was written to a public body about matters within its purview. (See Memo re Arbitrator's insane conclusions re these facts found).

**THE MUNICIPAL COURT DENIED MY MOTION TO
VACATE WITHOUT CAREFUL ANALYSIS OR
RECOGNITION OF ANY OF THE ISSUES**

Although Declarant was represented by counsel at the hearing in Municipal Court, she was present at the oral argument. Declarant had prepared an extensive brief pointing out all the gross errors of the Arbitrator (a shortened version of which was filed for the appeal to Superior Court, Appendix "E"), the standards for vacating otherwise binding awards, and the fact that

the Arbitrator's Award had far exceeded the scope of the pleadings. (See Appeal Brief, Appendix "E" p. 12-13) It was also pointed out during the oral argument that the Declarant's constitutional rights to notice and hearing had been violated by this fact. While Judge Duncan claimed to have read the pleadings, he was wholly non-committal at the time of the hearing and appeared to not be familiar with any of the facts/issues. On the conclusion of the oral argument Judge Duncan "denied" my motion to vacate in open court. I then filed for "rehearing" and argued the matter myself, this time vehemently bringing the gross error of agency law to his attention as well as the variance issue and the resulting denial of due process. I also repeated that these grounds more than met the standard applicable to vacate binding arbitrations. (Appendix "E" p.13-15) My adversary simply argued that since I had no "new facts", I was entitled to no rehearing. Judge Duncan now appeared to understand the error of the Arbitrator, but said "...it

might have been different if..." and then again "denied" the rehearing in open court at the conclusion of argument.

THE HEARING BEFORE THE APPELLATE DIVISION OF THE ALAMEDA COUNTY SUPERIOR COURT WAS WHOLLY DEFERENTIAL AND PERFUNCTORY WITH THE JUDGES DEMONSTRATING NO UNDERSTANDING OF THE ISSUES.

Again Declarant retained counsel to represent her, but she also attended the hearing. As her attorney began to speak about the derivative nature of the agency relationship, the judges appeared baffled about what he was talking about. Judge Travis was initially able to contribute only some generality about the burden of proof on an appeal. He also had some vague idea that a defamation action was involved and that the arbitrator had castigated Declarant. It appeared from his remarks that all he had read was Schuman's Responsive Brief and parts of her Cross-Complaint. He also said, "Well, she was nasty wasn't she?". On hearing my counsels argument about due process and the decision relating to unpleaded letters, Judge Eaton said: "Well, how could they (Schuman)

be expected to plead letters when they did not know about them?" (Schuman had conducted no discovery.) Judge McKibben's only contribution was to say: "Let's get this over with!".

During the orals Declarant's counsel appeared somewhat overwhelmed by the bias confronting him. It was obviously futile no matter what he said. The panel took the matter under submission and then issued a decision, not only affirming the arbitration, but they also Declarant to show cause why she should not be cited for having filed a "frivolous appeal"!!! Interestingly, they also cited the attorney in the case calendared immediately prior to Declarant's for "frivolous appeal".

THE HEARING ON FRIVOLOUS APPEAL DEMONSTRATED THE INDEFENSIBILITY OF WHAT THE APPELLATE PANEL HAD DONE

Declarant personally appeared to argue the sanctions. She began by inquiring whether they had affirmed because they had concluded that "gross error" was insufficient to vacate an otherwise binding arbitration. Judge

Travis appeared quite taken aback by Declarant's less-than-contrite approach, as well as by the question. He looked from side to side for help from his colleagues, upon getting no help, he then recovered and said: "Don't you be questioning us, you tell us why you should not be cited for sanctions"! The insane conclusion of the arbitrator about how an employer attorney could have no rights unless she actually met the clients and did the work was read directly out of the Arbitration Award, and Declarant asked: "Surely, you all do know better than that?" The panel was also informed that their ruling in favor of this reasoning would "come as a big surprise to Pillsbury, Madison and Sutro", and that accordingly, we "must have some sort of revolutionary new law in Alameda County"! Declarant then demonstrated how this pivotal finding had reversed liability and made Declarant liable to pay large damages to someone who had converted money and lied to clients. It was also brought to the attention of the panel that Declarant was

the sole attorney named in the retainer agreements, which fact ought to have been conclusive of whom had the rights, and that Declarant was therefore entitled to write truthful letters to protect those rights.

Judge Travis then interrupted saying: "We can't do anything about that now, why don't you tell us about sanctions"! Declarant pointed out that the whole issue as to sanctions was whether the appeal were meritorious and that the argument directly addressed the merits. He grudgingly let her continue. Judge Travis thereafter made this same remark three more times during the oral arguments and was met by the same response. The three judges on the panel became uncomfortable, agitated, and acted embarrassed. At one point, Judge Eaton said: "Now, you know that you did say nasty things in those letters!"

Finally, Judge Travis turned to the adversary, William Gibbs, who claimed Declarant was a vexacious litigation who had caused all this trouble over only \$90.00 in

rent and that therefore she should pay, at least, \$2,500.00 in sanctions. The matter was taken under submission.

THEREAFTER, DECLARANT FILED MOTIONS FOR REHEARING AND PETITIONS WITH THE DISTRICT COURT OF APPEAL, THE CALIFORNIA SUPREME COURT, AND THE UNITED STATES SUPREME COURT, AND WAS "DENIED" BY EACH.

Following the hearing affirmation of the judgement by the Appellate Division, Declarant petitioned both for rehearing and for certification to the District Court of Appeal. Each of which was "denied" prior to the hearing on sanctions. Declarant thereupon filed a Petition for Writ of Certiorari with the District Court of Appeal which was "denied" one day after it was sent to the judges of the Fifth Division of the First Appellate District. Declarant also Petitioned the California Supreme Court for Hearing and the United States Supreme Court for Certiorari and was, in turn, denied without opinion or comment. Following the receipt of the denial by the California Supreme Court, Declarant received the decision awarding sanctions of \$2,500.00.

Declarant thereupon petitioned the Appellate Division for Reconsideration and was "denied". Declarant thereupon again petitioned the District Court of Appeal relative to the award of sanctions, and was again "denied" by the Fifth Division of the First Appellate District. At each juncture, beginning with the Motion to Vacate in Municipal Court, Declarant informed each court of the fact that the judgment exceeded the scope of the pleadings and hence was void in that the same violated her Fourteenth Amendment due process rights to notice and hearing. Likewise, all the egregious errors of agency, contract, and defamation law were discussed and documented with many pertinent cases cited. (see Appendix "E")(see Appendix "F" for decisions) Declarant is informed and believe that Judge Duncan as well as the other Alameda County Judges had an overriding well-publicized objective of catching up with the backlog of cases. Hence, the determination to rid themselves of such disputes, and to discourage appeals by

refusing to reverse, apparently heedless of the rights of the litigants. This conclusion is based upon what I heard and observed during the oral arguments, what I have read in news reports made at around the time in question, and what is common knowledge among local attorneys.

Moreover, Declarant is informed and believes that the Fifth Division of the First Appellate District has a policy not to exercise their discretionary review of any civil matters from Municipal Court in that they consider them insufficiently important to warrant their time. The California Supreme Court, on the other hand had just lost three justices and was in transition when the said petition was filed.

VERIFICATION

I, the undersigned declare under penalty of perjury that the foregoing is true and correct. Executed on January 12, 1988 at San Francisco, California.

Patricia M. Bourke

(Proof of Service Omitted)

Law Offices
William D. Gibbs
169 14th Street
Oakland, Ca. 94604-1917

Attorney In Pro-Per and
Attorney for Defendants:
JEANNE SCHUMAN, DAVID HIMMELMAN

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PATRICIA M. BOURKE,)	
)	
Plaintiff,	)	No.C87-5134 JPV
)	
vs-)	
)	
	)	DECLARATION IN
JEANNE SCHUMAN, WILLIAM	)	SUPPORT OF MOTION
	)	TO STRIKE AND OR
GIBBS, DAVID HIMMELMAN,	)	DISMISS AND FOR
DOES I-X,	)	SANCTIONS AND
	)	FOR AN INJUNCTION
Defendants.)	
)	

I, WILLIAM D. GIBBS, declare that I am an attorney licensed to practice law in the State of California and am admitted to practice before this Court. I am the attorney of record for the named defendants in this action, and make this declaration in support of the above entitled Motion.

STATEMENT OF FACTS

The genesis of this complaint for Declaratory Relief and Damages lies in a law suit (sic) that Plaintiff BOURKE, filed against Defendant, JEANNE SCHUMAN, and two social security recipients on May 27, 1982. JEANNE SCHUMAN was an attorney that worked for and with BOURKE at one time and had various financial arrangements during that time. The social security recipients were clients that had been referred to Ms. SCHUMAN, while she was working with plaintiff. The attorneys worked out a referral arrangement as far as the fees were concerned. The matters related to social security problems of the two individuals. Subsequently Ms. SCHUMAN left the BOURKE law offices, as the result of a dispute, and took the two social security cases with her. She received the fees after resolving successfully the matters for both clients. She held the fees and attempted to resolve the fee dispute that arose, without success. The fees totaled \$1,879.45. Ms.

Schuman paid the plaintiff \$946.32 on one case and tendered \$653.00 on the other, asking only that she be paid the agreed upon referral fees. The plaintiff rejected the tender of \$653.00 and filed this lawsuit on May 27 1982. When SCHUMAN wouldn't give her all the fees, she sued for them (conversion) and for the loss of the two clients (interference with economic advantage). The difference between what was tendered and what was claimed was \$305.13. Ms. SCHUMAN cross-complained for defamation and breach of contract. The matter was put at issue and discovery completed. A brief chronology of the lawsuit follows:

1. A stipulation was entered into by the parties to have "binding arbitration" in open court on November 5, 1984.

- 2). The "binding arbitration" was held on June 11, 1985, and the Award signed on June 21, 1985. A copy of the Award is attached hereto as Exhibit "B". The cross-complainant, SCHUMAN, was awarded \$14,271.86

against the cross-defendant, and Judgment was entered on July 30, 1985.

3). Plaintiff filed her first Petition to Vacate Award, in the Alameda County Superior Court, on July 23, 1985. Defendant SCHUMAN filed her brief in opposition and to have the matter transferred to the Oakland-Piedmont-Emeryville Municipal Court where it began and properly belonged. The Alameda Superior Court denied the Motion to Vacate and ordered the matter transferred back to Oakland Municipal Court on August 15, 1985.

4. Plaintiff filed a Motion to Vacate Award in the Oakland Municipal Court on October 3, 1985. The matter was again briefed and argued. The petition was denied Nov. 7, 1985.

5. The plaintiff filed a Motion to Reconsider the denial of her previous motion. That was also briefed, argued and denied on December 6, 1985.

6. Plaintiff next filed a Notice of Appeal to the Appellate Division of the Alameda

County Superior Court on December 6, 1985. The appeal was briefed, argued, and denied 3-0 on August 22, 1986.

7. Plaintiff then filed a Petition for Rehearing and for Certification to the District Court of Appeals. That matter was briefed and denied 3-0, without hearing, on September 25, 1986.

8. The Appellate Division, on its own motion, invited plaintiff and real party in interest to brief the question of whether or not the Court should impose sanctions on plaintiff per California Code of Civil Procedure Sec. 907. That matter was briefed and argued on November 21, 1986, and \$2,500.00 sanctions were imposed on Plaintiff BOURKE, which have not been paid.

9. Plaintiff's Petition to the California District Court of Appeals was denied without comment on September 29, 1986.

10. The Petition for Review to the California Supreme Court was denied, without comment, on December 17, 1986.

11. The Petition for a Writ of Certiorari to the United States Supreme Court was denied, without comment, on June 1, 1987. This suit is the ninth attempt by plaintiff to overturn the arbitration award! She has failed to convince eight different courts and 28 judges (Justice Broussard did not vote on the Petition for Review before the California Supreme Court), of the merits of her cause. The entire complaint reads like a bad novel and, when boiled down to its basics, is merely a re-hash of the Oakland-Piedmont-Emeryville Municipal and Alameda County Superior Court actions. (see attached Group Exhibit.)

Plaintiff BOURKE'S rather novel theory in her complaint, filed herein, seems to be that, being the unsuccessful party to the law suit, she has somehow been denied her constitutional rights because she lost the law suit and the successful party and her attorneys are somehow co-conspiratory in denying those rights. She says that, without

citations, the Award and Judgment are void on their face. She claims that, without the due process of the 14th Amendment the Court was without jurisdiction of the subject matter and deprived her of her property. She also claims that her rights to free speech were violated. These are a rehash of the arguments made to the California Supreme Court, and the U.S. Supreme Court, which were denied unanimously. She contends that the attorney defendants were fraudulent and in bad faith by merely representing SCHUMAN, without citation. BOURKE is also, for the first time, complaining of being denied equal protection by reason of gender. This is equally novel, especially when both parties to the underlying action were of the same sex. The Sixth cause of action is a mystery, but sounds like a Motion to be relieved of a judgment which arises out of the \$2,500.00 sanctions awarded by the Appellate Division of the Alameda Superior Court against her. She has requested punitive damages against

the lawyers, presumably for winning. It should be pointed out that in plaintiff's heading of the complaint her citation - 28 U.S.C. 400 - doesn't exist, so defendants are at a loss to understand what plaintiff means.

Plaintiff gives us no clue in the multitude of causes of actions she attempts to plead. It is difficult to see how plaintiff has been deprived of her due process rights, for example, when she has been represented in every step of this law suit, either by counsel (four to date) or by herself in propria persona. She has been present at every hearing, trial, arbitration, appellate hearing and review since she filed the complaint on May 27, 1982. She has received notice of every hearing and had, as a result, generated at least 25 pounds of pleadings. She has had eight different courts rule on her pleadings in the underlying California action. She just can't accept the fact that California law will not let her defame someone with

impunity. She will not accept the fact that a trier of fact did not believe her when she pled truth as a defense to the scurrilous language directed at Defendant, SCHUMAN. The plaintiff has attempted to take advantage of the fact that she is a licensed attorney by turning a several-hundred-dollar law dispute into a vendetta against defendants, the arbitrator, and the judges that have ruled against her on eight prior attempts. Plaintiff has raised, without success, the issues of void judgment, due process, free speech, gross legal errors in the award, and sanctions before the Courts of Appeal in California and the U.S. Supreme Court. She is trying this forum in an effort to re-litigate all the matters resolved in the litigation that has been on-going since May, 1982.

A reading of the complaint is sufficient to show its frivolous nature on its face. Any reasonably competent attorney, practicing before this court, would have a difficult

time understanding what plaintiff is saying, let alone finding any legal basis for it. The improper purpose is rarely as blatant as plaintiff has set forth. She doesn't want to pay off the judgment that is in force, in California, against her, e.g. when asked by the undersigned at the Order of Examination hearing how she intended to pay off the judgment, Bourke replied, "I don't intend to pay the judgment." What better way to avoid payment than to create new litigation (the 9th attempt)? There is no doubt that almost six years of litigation, hundreds of dollars in costs, and untold hours of court time spent litigating and re-litigating the same issues is more than a mere bother, vexing or annoying. It is a burden on the entire court system to have to deal with this vexatious litigant and her multiple actions on the same subject. Plaintiff's bad faith (not a Rule 11 requirement) is blatantly obvious throughout the complaint. The unfounded charges, the charged language, all lend

credence to the lack of merit of the entire complaint. Defendants have answered and raised several affirmative defenses, including res judicata, and that the complaint is not well founded in fact or warranted by law, and was filed solely for the purpose of harassing the defendants and delaying the collection of a valid state judgment and to needlessly increase the costs of litigation, all in violation of the letter and spirit of Rule 11. These defenses stand out when viewed in conjunction with the chronology of the underlying action. The court will be asked to take judicial notice of the pleadings and files in the underlying actions, which, when viewed together with the complaint, will make it clear that plaintiff is engaged in a vendetta against everyone attached to this matter and is resolved to harass them in hopes that they will lose their will and abandon the cause and she won't have to pay the judgment after all. This is an improper purpose.

Plaintiff's complaint should be dismissed, and she should be sanctioned and enjoined from filing any similar actions against defendants in this court or any other court under penalty of losing her privilege of practicing before this court. The undersigned spent a minimum of 15 hours answering the complaint, researching and writing this Motion, declaration and memorandum of law. My hourly rate is \$150.00 per hour, which is a reasonable rate for an attorney that has been in practice for almost 24 years. I would respectfully suggest that a sanction of \$5,000.00 would be reasonable and would act as a deterrent to plaintiff's future conduct.

I declare under penalty of perjury that the foregoing is true and correct and is offered in support of the above-entitled motion and is not imposed for any improper purpose or motive. Dated this 20 day of Jan., 1988 at Oakland, California.

s/ William D. Gibbs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

--000--

BEFORE THE HON. J. P. VUKASIN, JR., MAGISTRATE

PATRICIA M. BOURKE,

PLAINTIFF,

VS.

JEANNE SCHUMAN, WILLIAM
GIBBS, DAVID HIMMELMAN,
DOES I-X,

DEFENDANTS.

NO. C 87-5134 JPV

REPORTER'S TRANSCRIPT OF PROCEEDINGS

FEBRUARY 25, 1988

APPEARANCES:

FOR THE PLAINTIFF:

GREGORY S. STOUT, ESQUIRE
220 MONTGOMERY STREET, #1010
SAN FRANCISCO, CA 94104

FOR THE DEFENDANTS:

WILLIAM D. GIBBS, ESQUIRE
169 - 14TH STREET
OAKLAND, CA 94604

REPORTED BY:

JOAN DINNING, PRO-TEM REPORTER

EXCERPTS ONLY FROM ORALS BEFORE
HON. J. P. VUKASIN, JUDGE OF
THE U.S. DISTRICT COURT

REPORTER'S TRANSCRIPT p.4 lines 20-25, p. 5
lines 1-18

THE COURT: OKAY. THIS IS TERRIBLE. IT'S BEEN REPRESENTED TO THIS COURT THAT BOURKE CALLED SCHUMAN A "KIKE" AND A "BITCH". THAT BOURKE CALLED THE CALIFORNIA BAR ASSOCIATION AND THE OAKLAND POICE, SOME FEES WERE EXCHANGED. BOURKE FILED SUIT IN MUNICIPAL COURT; BOURKE ALSO COMMENCED PROCEEDINGS AGAINST SCHUMAN BEFORE THE BAR ASSOCIATION; WROTE LETTERS TO THE TWO SOCIAL SECURITY CLAIMANTS, STASKA AND HORNOF; AND THEN BOURKE FILED SUIT AGAINST THE TWO SOCIAL SECURITY CLAIMANTS APPARENTLY WHEN THEY REFUSED TO COOPERATE WITH HER. SHE'S ALLEGED TO HAVE WRITTEN THE SOCIAL SECURITY ADMINISTRATION WHO SHE UNDERSTOOD TO BE SCHUMAN'S NEXT EMPLOYER AND ANOTHER PARTY WHOM BOURKE BELIEVED TO BE INTERESTED IN HIRING SCHUMAN. I THINK FOR THE RECORD SHE WROTE TO THE SOCIAL SECURITY ADMINISTRATION OVER THE FEES BEING COLLECTED BY SCHUMAN AND

THEN HAD COMMUNICATIONS WITH SCHUMAN'S PROSPECTIVE EMPLOYER, MR. HIMMELMAN, AND THEN ANOTHER INDIVIDUAL WHO SHE THOUGHT SCHUMAN MIGHT GO TO WORK FOR. SHE CALLED HIM DIRECTLY AND VOLUNTEERED THAT SHE COULD NOT GIVE SCHUMAN A GOOD REFERENCE, AND SOME 15 PIECES OF CORRESPONDENCE TO THEIR PARTIES. BOURKE USED THE WORDS "SPITEFUL", "IMPUDENT", "ARROGANT", "CHILDISH", "THIEF", "BLACKMAILER" AND "LITTLE EMBEZZLER".

Transcript p. 6, lines 5-9, Judge Vukasin continued...

BECAUSE OF BOURKE'S AUDACITY IN HANDLING THE AFFAIR, HE AWARDED SCHUMAN A TOTAL OF \$4,500. IN COMPENSATORY DAMAGES AND \$10,000 IN PUNITIVE DAMAGES AGAINST BOURKE FOR SCHUMAN'S DEFAMATION AND EMOTIONAL DISTRESS. ONE PASSAGE IN THE ARBITRATOR'S MEMO AND OPINION THAT I THINK BEARS REPEATING AND SHOULD BE NOTED IN THE RECORD. HE SAID, "THE AWARD HEREIN REFLECTS AMONG OTHER THINGS THE PROFOUND SENSE OF OUTRAGE FELT BY THE UNDERSIGNED AT THE INTEMPERATE UNWARRANTED, AND RELENTLESSLY HOSTILE ATTACKS CONDUCTED BY

BOURKE ON LITERALLY EVERY PERSON CONNECTED WITH THE UNFORTUNATE EPISODE..."

Transcript page 6 lines 24-25, p. 7 line 1
Judge Vukasin continued:

I THINK THE RECORD SHOULD NOTE BOURKE CONTINUED HER PURSUIT OF HER CLAIMS IN THE FOLLOWING MANNER. (there follows an itemization of the appeals and writs taken in the State Court System).

Transcript p. 8 line 6, Judge Vukasin continued:

APPARENTLY, THIS ACTION IS BASED ON A CLAIM THAT SHE WAS DENIED DUE PROCESS...

Transcript p. 8 lines 8-14, Mr. Stout: (Petitioner's counsel): ESSENTIALLY THAT THE JUDGMENT BELOW IS A SHAM JUDGMENT BASED ON OBVIOUS ERRORS OF LAW, BOTH OMISSION AND COMMISSION. I WOULD ONLY POINT OUT TO THE COURT THAT UNDER CALIFORNIA LAW, AS THE COURT WELL KNOWS, SECTION 47 OF THE CIVIL CODE IS A LITIGATION PRIVILEGE THAT IS ABSOLUTE AND SUBSTANTIVE UNDER CALIFORNIA LAW...

Transcript p. 8 lines 19-25, Mr. Stout continued)

THE POINT OF THE SITUATION IS THAT BOTH THE CALIFORNIA SUBSTANTIVE LAW PRIVILEGE APPLIES BOTH TO THE PRELITIGATION CONTEXT AND TO THE LITIGATION CONTEXT. AND WE CONTEND BASICALLY AND ESSENTIALLY THAT EVERYTHING HEREIN IN THE WAY OF JUDGMENT PREDICATES ITSELF UPON COUNTS 4 AND 5 AND WILFULL INFLICTION, AND BOTH ARE COVERED BY THE PRIVILEGE UNDER SECTION 47.

Transcript p.9 lines 1-7 (Mr. Stout Contd.)

...AND IT WOULD APPEAR THAT EACH OF THE FEDERAL DISTRICTS AND CIRCUITS ARE BOUND BY THE SUBSTANTIVE LAW OF THE STATES ON THOSE TYPES OF CASES WHERE THE PARTICULAR ISSUE IS RAISED. IT'S OUR POSITION THAT THE SUBSTANTIVE RIGHTS PROTECTED BY SECTION 47 HAVE BEEN ABROGATED ALL ALONG THE WAY...

(Transcript p. 10, l. 4-5, Mr. Stout contd)
ADVOCATIONAL IMMUNITY ALSO RUNS THROUGH THE WHOLE SITUATION.

(Transcript p. 10 lines 12, 14, 16-25, Judge Vukasin:)

THE COURT: ALL RIGHT. I WANT TO RESPOND TO

THAT. PLAINTIFF ARGUES THAT PORTIONS OF THE JUDGMENT SHOULD BE ENJOINED BECAUSE IT IS VOID. PLAINTIFF HAS ARGUED THAT THE ARBITRATOR'S AWARD WENT BEYOND HIS STATUTORY AUTHORITY ON THE GROUND THAT THE ARBITRATOR ARE (sic) AWARDED DAMAGES FOR CLAIMS NOT MADE IN SCHUMAN'S COUNTER-CLAIM. THIS ARGUMENT IS WRONG FOR SEVERAL REASONS. FIRST THE ARBITRATOR AWARDED DAMAGES FOR DEFAMATION AND EMOTIONAL DISTRESS, WHICH CLAIMS WERE PLED IN THE COUNTER-CLAIM. SECOND, CALIFORNIA RULE OF COURT 16.5 PERMITS THIS AWARD. IT AUTHORIZES ENTRY OF AN ARBITRATION AWARD AS A FINAL JUDGMENT. THIRD, DESPITE PLAINTIFF'S ARGUMENT TO THE CONTRARY, THE ARBITRATOR'S FINDINGS AND CONCLUSIONS ARE WELL-FOUNDED IN FACT AND LAW. PLAINTIFF'S BRIEF IS FULL OF CITES TO INAPPLICABLE CASES AND SHRILL ACCUSATIONS DIRECTED TO EVERYONE IN THIS CASE. ADDITIONALLY, THE PLAINTIFF HAS FILED A SUPPLEMENTAL BRIEF IN SUPPORT OF THE TEMPORARY RESTRAINING ORDER, ENJOINING THE ALAMEDA COUNTY SUPERIOR COURT FROM ENFORCING

ITS SANCTION AWARD AND ITS BENCH WARRANT...

(Transcript p. 11, lines 23-25, p. 12, l. 1 opposing counsel Gibbs):

WHAT SHE DID NOT DO WAS OBEY THE COURT'S ORDER OF PAYMENT OF SANCTIONS. I WENT IN AND MOVED FOR AN ORDER TO SHOW CAUSE RE CONTEMPT IN THE ALAMEDA COUNTY SUPERIOR COURT APPELLATE DIVISION...

(Transcript p. 12 l. 190-25, Mr. Gibbs continued)

....MR. STOUT HAD FILED A PACKET OF PAPERS WITH THE COURT, THE ALAMEDA COUNTY APPELLATE DIVISION... NO REQUEST FOR CONTINUANCE WAS MADE TO MY OFFICE OR TO ME; AND JUDGE MCKIBBEN ON THAT MORNING WHEN I APPEARED IN COURT AND NO ONE SHOWED, DID NOT GRANT THE REQUEST SUCH AS IT WAS FOR THE CONTINUANCE BECAUSE IT WAS NOT TIMELY FILED, WAS NOT PROPERLY FILED OR NOTICED, AND A BENCH WARRANT ISSUED. THE \$50,000 CASH BOND WAS PART OF THAT BENCH WARRANT.

(Transcript p. 12, lines 24-24)

THE COURT: SUCH A CONTEMPT SANCTION AND BENCH WARRANT ARE JUSTIFIED UNDER THE CIRCUMSTANCES

IN MY OPINION. I'M DENYING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER. WE HAVE DEFENDANTS' MOTION TO STRIKE OR DISMISS THE COMPLAINT PURSUANT TO RULE 11. THE NINTH CIRCUIT HAS DEFINED THE STANDARDS FOR RULE 11, THE PLEADING MUST BE REASONABLE UNDER THE CIRCUMSTANCES, THE PLEADING NEED NOT BE IN WILFULL BAD FAITH FOR RULE 11 SANCTIONS TO BE IMPOSED. COURT ALSO NOTED THAT WITHOUT QUESTION SUCCESSIVE COMPLAINTS BASED UPON THE PROPOSITIONS OF LAW PREVIOUSLY REJECTED MAY BE HARRASSMENT UNDER RULE 11.... PLAINTIFF IS SIMPLY TRYING TO HARASS AND VEX THE DEFENDANTS, IN MY OPINION. I THINK THE COURT SYSTEM IS BEING USED IMPROPERLY...

(Transcript p. 14 lines 20-23, Judge Vukasin):
THE COURT: ...I'M GOING TO GRANT THE MOTION TO DISMISS PURSUANT TO RULE 11. IN ADDITION, I AM GOING TO IMPOSE SANCTIONS, AND I AM GOING TO GRANT SANCTIONS OF \$5,000 AS REQUESTED BY DEFENDANTS.

IN THE MUNICIPAL COURT OF THE STATE OF
CALIFORNIA, IN AND FOR OAKLAND-PIEDMONT-
EMERYVILLE JUDICIAL DISTRICT

PATRICIA M. BOURKE

Plaintiff,

NO. 389281

VS-

JEANNE SCHUMAN,

Defendant. / ORDER OF EXAMINATION
/ OF PATRICIA M. BOURKE

AND RELATED CROSS-
ACTIONS

Taken before Claudia J. Knap, a Notary
Public, In and for the County of Alameda
State of California

May 20, 1988

HON. LEWIS MAY, PRESIDING

(Pertinent Excerpts Only...

(Page 3 lines 3-13:)

GIBBS: My name is Mr. Gibbs. I am an
attorney. I represent the interest of Jeanne
Schuman, who is a cross-defendant in an action
entitled Patricia M. Bourke v. Jeanne Schuman,
Action Number 389281 in the Piedmont-
Emeryville Judicial District.

It is May 20, 1988. The time is approximately 2:43. We are in Department 1 of the above entitled court appearing on an Order to Appear for examination. The order was personally served on Patricia M. Bourke on the 29th day of April, 1988, in the Alameda County Superior Court.

(p. 3 line 21-22:)

GIBBS: Madam Reporter, please swear this witness.

(p. 4 lines 11-14)

GIBBS: You consider yourself to be a sworn witness for the purposes of this examination?

BOURKE: to the extent I give you actual statements, yes, sir.

(p. 5 lines 10-13)

GIBBS: Right now this is an Order of Examination and you are a judgment debtor in the above action that we've been talking about; is that correct?

BOURKE: The judgment is void, sir, and you know it.

(p. 5 lines 16-17:)

GIBBS: Where do you reside?

BOURKE: I refuse to answer any under Evidence

Code 940.

(p. 5 lines 24-26, p. 6 line 1:)

GIBBS: Are you currently employed?

BOURKE: I will invoke the Evidence Code 940 as to any question relative to my living circumstances, assets or income.

(p. 6 line 4)

BOURKE: I have a memo here for the Court.

(p. 6 lines 10-26, p. 7 lines 1-12)

JUDGE MAY: Ms. Bourke has handed me through the clerk a document entitled "Memorandum of Points of Authorities In Re the Invocation of E.C. 940 at the Order of Examination."

There is presently pending an order to show cause in re contempt, in re the failure of cross-defendant to pay sanctions in the amount of \$2,500. Said proceeding is for the purpose of imposing criminal quasi punishment (sic) on the cross-defendant, if it can be demonstrated that cross-defendant had ability to pay said sanctions and refused. Consequently, the cross-defendant invokes the provisions of 940 in connection with any and all questions relative to her assets, income

and her present living circumstances in that the answers may tend to incriminate her. That means incriminate her in the Superior Court or the pending case where there is an order to show cause in re contempt.

BOURKE: Yes, ma'am. (sic) There is (sic) also sanctions from the Federal Court. I don't believe the Fifth Amendment requires an actual -- even if this matter be pending, if potential criminal charges could come from a person's own testimony, whether it be contempt charges in say a dissolution case or something like that. I don't think you have to answer any question that may tend to incriminate you, even though there actually is no proceeding presently pending.

(p. 7 lines 18-26, p. 8 lines 1-11)

BOURKE: I don't think any question like that has to be answered and if it could tend to incriminate, that comes within the Fifth Amendment rather squarely. In this case there are sanctions right within this judgment. It really isn't a separate matter and I have been ordered to appear before Judge McKibben on the

7th of June relative to the contempt that was brought by this judgment (sic) in connection with this case. And one of the elements of their proof is the ability to pay. And what he'd like to find out for (sic) me now is what my earnings are and what my living circumstances are, all of which adds up to ability to pay. So it seems to me to be square on, open shut (sic). The Fifth Amendment is very broad. In fact, the case that I had down here says great latitude. In fact, I have a case here regarding judgment debtor proceedings where they're tied into a potential contempt citation. That's exactly what we have and it seems to me to be square on.

(p. 8 lines 15-26, p. 9 lines 1-8)

GIBBS: Today, Your Honor, an order to appear for examination was issued out of this court, was served upon Patricia M. Bourke which a deputy sheriff of the County of Alameda personally directed her to appear at this time and place for examination. That is all that's

before the Court. This was the first time I've seen the memorandum served upon me approximately 45 minutes ago. Frankly, I think its a crock, but I haven't had a chance to research the cases. What the judgment debtor is seeming to say is, "Na, na, na, na, na. You've got a judgment but you can't ask me any questions about it because if I answer any questions about it, it might tend to incriminate me in some other proceeding that isn't before the Court." There are two sanction orders, one by the Superior Court Appellate Court (sic) in the Alameda County for \$2,500.00 and one for \$2,500.00 issued by the U.S. District Court, Ninth Circuit. These are entirely separate matters from the judgment...

(p. 9 lines 16-26, p. 10 lines 1-26, p. 11 1-5:)

GIBBS: I intend to ask her that question under oath with a Court Reporter present and frankly, I think I'm entitled to, since a sufficient time has lapsed between the two orders, to ask her questions to what she's

done with her assets and where she lives and things like that. She hides behind her P. O. Box in her quote "professional practice" and she's been very hard to serve. I've got jurisdiction of her now before this Court and I don't want to lose it. She's wily, she's using every dodge that she can think of to avoid having to pay a judgment that the Supreme Court of the United States has refused to set aside and we're going to do everything we can to get that judgment.

BOURKE: May I speak? If what we're dealing with here is a separate judgment, I just want to say this is as (sic) an aside so Your Honor will not think poorly of me as a result of this dissertation that just occurred. This matter is now before the Ninth Circuit. The District Court Judge, John Vukaskin, threw this out of court. Made statements on the record which are diametrically opposed to both federal and state law. There is (sic) federal grounds here. I have been advised by a rather prominent constitutional lawyer all the way

through. The underlying judgment is void, lacking in due process, notice and hearing. In fact, I have a memorandum of points of authorities (sic) here before me right now that I would like to give you to ask that you vacate this judgment sua sponte. I have approached another judge in the Municipal Court with a similar petition or memo or whatever it is. My fear is that the matter has now become political and that the judges are refusing it to do (sic) for that purpose, although your colleague did say that it was void but he didn't want to vacate it because of his friendship for one of the members of the panel in the Alameda County Superior Court that refused to vacate in the past and accept sanctions (sic) which makes the whole thing come in as slightly incredible. But if you were to read the arbitrator's statement, you mind find the like of which you 've never read before in your life.

(p. 11 lines 14-26, p. 12 lines 1-13:)

...we don't have a straight judgment

here. In fact, we have sanctions from two different courts which are an order, not just judgment. So on that basis, the judgment creditor brought a contempt proceeding which is continuing to pend based on those sanctions from Alameda Superior Court and that matter has been continued until June 7th at which point I either pay the sanctions or be held in contempt of court if Mr. Gibbs in (sic) a position to prove that I have the ability to pay and refuse to do so. What he'd like from me today is proof of my ability to pay out of my own mouth. And that is squarely, on all fours, exactly what is prohibited by the Fifth Amendment. We aren't just dealing with a debt and a judgment. If we were, then the invocation of the Fifth Amendment would certainly be questionable. But given the fact that there are sanctions and that there is actually contempt proceeding right now, that would like to have me found in contempt of court on June 7th and the only threat (sic) in his fabric that is lacking is ability to pay and he'd like me to tell him about that today,

and he'd like an order from you forcing me to do that. I have put a memo in front of you. If there is any aspect of the matter --

(p. 12 line 13, line 17-22)

JUDGE MAY: I've read the memo... I've read the memo and I've perused the file. And the case, it appears, has gone to judgment and gone up on appeal and hasn't it been affirmed on appeal?

GIBBS: Before the California Supreme Court and United States Supreme Court.

(p. 13 lines 1-15)

JUDGE MAY: I am ready to rule now, Ms. Bourke, and I feel this is a proper order of examination and I think you should take the stand and answer the questions.

BOURKE: I guess I am in contempt of court because I won't do that.

JUDGE MAY: You can take the stand, be sworn and we'll ask the questions.

BOURKE: I would like to have further opportunity to brief the matter or continue it to another day or until I have counsel

present.

JUDGE MAY: No. This is all ready. It's been set and calendared and brought before a commissioner and is now back here again. You may take the witness stand and be sworn.

(p. 14 line 18)

CLERK: Do you solemnly swear... (witness is sworn)

(p. 14 lines 25-26, p. 15 lines 1-3)

GIBBS: State your name for the record, please?

BOURKE: Patricia M. Bourke

GIBBS: Where do you reside, Ms. Bourke?

BOURKE: I refuse to answer on the grounds that it is a connecting link to information about my assets...

(p. 15 lines 12-26, p. 16 lines 1-8:)

BOURKE: My present living circumstances are a matter of the Fifth Amendment privilege.

GIBBS: Your honor, I am asking you to direct the witness to answer the question.

JUDGE MAY: The Court will direct you to answer the question.

BOURKE: I am in contempt of court then if that's what you want to say because I have my

rights. I have constitutional rights, I have an attorney who has advised me in this way and I have researched the law. If you want more points and authorities on the subject--I don't understand why it is you think that this doesn't apply.

JUDGE MAY: I don't want you to go on, Ms. Bourke. As far as I know, I do have authority don't I, to put you in contempt and put you in jail for contempt.

BOURKE: If that's what you wish to do.

JUDGE MAY: I'm going to warn you that I will research that and make certain of that and I am going to warn you that these answer may result in my placing you in custody.

BOURKE: I am aware of that, but I do have Constitutional rights, I hope.

JUDGE MAY: Do you hear me when I tell you to answer the question as to your present place of address?

(p. 16 lines 14-26, p. 17 lines 1-12:)

JUDGE MAY: Do you hear the question?

BOURKE: Yes.

JUDGE MAY: Do you understand the question?

BOURKE: Yes.

JUDGE MAY: We'll set that aside to be cited for contempt.

GIBBS: All right, Your Honor.

GIBBS: Ms. Bourke, will (you)(sic) answer any questions directed to your assets that you currently hold, as of May 20, 1988.

BOURKE: No.

GIBBS: Your honor, I will ask that the court direct the witness to answer any questions put to her relating to her assets that she holds as of May 20, 1988.

JUDGE MAY: I would so direct you.

BOURKE: Invoke the Fifth Amendment.

JUDGE MAY: You have heard the question and understand it, and I will cite you in that regard.

GIBBS: Are you employed?

BOURKE: I will take Evidence Code 940, often known as the Fifth Amendment.

GIBBS: Your honor, I will ask that you direct the witness to answer the question regarding employment.

JUDGE MAY: I direct you to answer regarding your employment.

(p. 17 line 26, p. 18 lines 1-8)

GIBBS: Where do you practice law; where do you have your office?

BOURKE: I refuse to answer on the grounds that it is a link which would tend to assist you in proving contempt.

JUDGE MAY: You asked me to direct her to answer?

GIBBS: Yes, your Honor. That will be a standing request if she refuses to answer on Evidence Code 940 or the Fifth Amendment.

JUDGE MAY: I will direct you to answer.

(p. 18 lines 22-26, p. 19 lines 1-16:)

(There followed questions regarding property owned, property sold, bank accounts, loans made, notes and deeds of trust held. Bourke invoked the Fifth Amendment (Ev.Code 940) to each question, with Judge May citing her for contempt each time)

JUDGE MAY: Ms. Bourke, we're getting on in the afternoon. I am going to give you a warning that I am going to put you into custody today if you do not answer these questions today, this afternoon.

BOURKE: I get one phone call, don't I?

JUDGE MAY: Yes. You get one phone call.

BOURKE: I guess this case is coming to this and it is a political matter, and I understand what's happening to me.

JUDGE MAY: There is nothing political about my decision. I am telling you you must answer these questions in a normal course in an Order for Examination.

BOURKE: Would you explain why you don't think the Fifth Amendment applies?

JUDGE MAY: I am not going to explain. You're fully aware of the law.

BOURKE: My understanding of the law is it's open and shut.

JUDGE MAY: Don't be surprised that I am going to open that door and put you in jail if you don't answer.

BOURKE: I am prepared for that. I am seeing this through the whole way. I have proceedings here for you to see that it is a void judgment.

(p. 24 lines 12-26, p. 25 lines 1-15:)

JUDGE MAY: ...This apparently isn't an

ordinary order of examination because it does appear that I'm going to have to put Ms. Bourke in jail. If you just limit questions strictly limited to assets and any assets she has which could be used to help pay this judgment that you have.

(There followed further questions regarding Bourke's accounts receivable and life insurance, with Bourke citing the Fifth Amendment to each question, and Judge May holding her in contempt for each refusal).

BOURKE: You want information out of my own mouth so you can convict me of contempt. This is unbelievable.

GIBBS: This is not a contempt proceeding.

BOURKE: I am flabbergasted at your ruling.

JUDGE MAY: You're a witness now and I have heard your argument and I have ruled that the Order of Examination must proceed and it is proceeding, and if you have any more questions, Mr. Gibbs --

GIBBS: Your Honor, it's obvious that we have reached a point where any question I might ask relative to assets is not going to be answered by Ms. Bourke and I believe sufficient ground

has been laid for the asking of the questions. She is persisting in refusal. I would ask the court to hold her in contempt accordingly...

(p. 26 lines 17-26, p. 27 lines 1-26:)

JUDGE MAY: I am finding you on contempt on all the questions cited and I am going to order you to serve five days in jail. And, do you wish a stay of execution?

BOURKE: I am not represented by counsel right now. I am puzzled as to why your Honor does not find the Fifth Amendment applicable and I would like a further opportunity to brief that. I am not sure if it's because it's a separate proceeding, is it because it's contempt and not straight criminal?

JUDGE MAY: I have already heard your argument and I have read and considered your brief and I have proceeded with the Order of Examination, and now I've cited you for cotempt and I am sentencing you to five days in jail for this contempt. I am asking you a simply question: Do you want a stay of execution?

BOURKE: Yes. I am preparing papers right now

for the Federal Court to have a summary reversal and a stay of the entire proceeding. This could become part of it. So, I think they could hear that probably within 30 days.

JUDGE MAY: I'll stay the execution until Wednesday of next week at 2:00 p.m.

BOURKE: There is to be no further hearing?

JUDGE MAY: I am just granting you a stay of execution. You can consult with counsel in the meantime. Otherwise, come prepared to serve your five days in jail.

BOURKE: That's next Wednesday?

JUDGE MAY: Yes. 2:00 p.m.

DISTRICT COURT OF APPEAL OF THE STATE OF
CALIFORNIA, IN AND FOR THE FIRST
APPELLATE DISTRICT

PATRICIA M. BOURKE,

Petitioner and
Appellant

vs-

OAKLAND-PIEDMONT
EMERYVILLE MUNICIPAL
COURT,

Alameda Co. Sup.
#639042-6
Dist. Ct. Appeal
#A043520

Respondent.

JEANNE SCHUMAN,

Real Party in Interest /
/

REPORTER'S TRANSCRIPT
ON APPEAL FROM FINAL
JUDGMENT OF THE SUPERIOR
COURT OF THE STATE OF
CALIFORNIA IN AND FOR
COUNTY OF ALAMEDA

6/29/88

HON. MICHAEL BALLACHEY, PRESIDING JUDGE

COUNSEL FOR APPELLANTS: COUNSEL FOR
RESPONDENTS:

Patricia M. Bourke
In Propria Persona

William Gibbs
Attorney at Law

Only the most pertinent parts of the transcript as related to "void judgment" are herein reproduced. The within hearing dealt with both the Municipal Court Contempt arising from Order of Examination, and also with Petitioner's attempt to secure an order declaring it a "void judgment". The Superior Court set aside the contempt found by Judge May at the Order of Examination, pursuant to Ev. Code 940, and hence court and counsel's remarks related to that issue are not herein involved.

(p. 2 lines 7-28, p. 3 lines 1-6)

GIBBS: William Gibbs, Your Honor, on behalf of Respondent.

BOURKE: Patricia Bourke, pro per. I'm an attorney.

JUDGE: You actually represent the real party in interest, is that right, Mr. Gibbs?

GIBBS: That is correct, real party in interest Jeanne Schuman.

JUDGE: I issued a tentative ruling in this matter denying the writ, and I have read this over again, and I think the following -- I think the writ should unquestionably be denied and the judgment be void on its face, and I think that's becoming, if nothing else, Ms. Bourke, a

financial problem for you because you have now been told by twenty-nine judges.

GIBBS: Yes, your honor.

JUDGE: At least two -- I don't know how many of whom, but at least three of whom have felt that it was frivolous to keep raising the issue and that you should stop raising the issue. I'm not going to complicate your life by imposing sanctions because it's frivolous, but I'm going to deny the writ on those grounds. But, I do think that -- I think there is a serious problem posed by the Fifth Amendment assertion as long as there are proceedings pending in which Ms. Bourke's asset picture is an element of the case against her, unless there is a grant of immunity.

(p. 6 lines 21-28, p. 7 lines 1-5)

JUDGE: ...The writ is specifically denied as it pertains to the assertion that the judgment, the underlying judgment is void on its face.

BOURKE: Couldn't I address that first?

JUDGE: What?

BOURKE: Can I not address that issue?

JUDGE: If you want to say something that you have not said in your pleadings, you may.

BOURKE: Well, your Honor, you've made a number of statements here that I realize, you know, this is one among probably twenty cases. This is something I have lived with for three years, researched it very carefully, both state and federal.

JUDGE: ...You are wrong in your analysis of the res judicata issue and the void on its face, and your attempts to quote from various authorities... We have in this system of justice a principle called res judicata.

BOURKE: Right, that's what my research is about.

JUDGE: We have principles, talk about reference to arbitration, binding arbitration, appeals, attempt to vacation (sic) judgments, appeals with decisions rendered on appeal, all of which are

designed for the very legitimate policy reason to put cases to rest, to put them at end. And this case, in the famous words of American philosopher Yogi Berra, it's over. Until you find someone who is of interest to take it other than in this remedy, so this writ is denied. I don't want to hear any argument. I don't need any argument. I agree with the twenty-nine other judges who have addressed the issue, three of whom are on this appellate court. You know, we don't have peer review in our system of justice. I am not about to reverse a finding of the Appellate Division of this Court. So I don't want to have anymore argument on the issue. The writ is denied.

BOURKE: That's exactly what I was going to say. They didn't address the issue. They wrote one opinion on sanctions and ignored the entire issue.

JUDGE: That's not correct, is it?

GIBBS: That is correct, Your Honor.

BOURKE: Yes, it certainly is correct, and

I would be glad to give you --- I don't know--

JUDGE: I read the opinion, Ms. Bourke.

BOURKE: They didn't address the variance issue. What we're saying here is that defamation does not have to be specifically pleaded. We have whole letters on which the statute of limitations had run, which were privileged --

JUDGE: I'm going to call another case.

FILED
Jul. 8, 1988
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICIA M. BOURKE,)	
)	
Plaintiff/Appellant	)	No. 88-2446
)	
vs-	)	DC# CV-87-5134-JPV
	)	Northern California
JEANNE SCHUMAN, et al	)	(San Francisco)
)	
Defendants/Appellees	)	ORDER
)	

Before: POOLE and O'SCANNLAIN, Circuit Judges

The Motion for Summary Reversal is denied. The motion for a stay pending appeal is denied.

Appellant is directed to read the provisions of Fed. R. App. P. 38 and is admonished that she may be subject to sanctions if this appeal proves frivolous.

Appellant shall serve and file a brief within 40 days after the filing of this order. Further briefing shall proceed in accordance with Fed. R. App. P. 31(a).

MoCal 7/6/88

6

0222

FILED
OCT. 6, 1988
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICIA M. BOURKE,)	
)	
Plaintiff/Appellant	)	No. 88-2446
)	
vs-	)	DC# CV-87-5134-JPV
	)	Northern California
JEANNE SCHUMAN, et al)	
	)	MOTION TO AUGMENT
Defendants/Appellees	)	RECORD, SUPPORTING
	)	DECLARATION, MEMO

SUMMARY ONLY

THE MOTION, SUPPORTING DECLARATION, AND MEMO COMPRISED 18 PAGES. THE ITEMS WHICH APPELLANT SOUGHT TO PUT BEFORE THE NINTH CIRCUIT CONSISTED OF DOCUMENTATION OF THE SUBSEQUENT COLLECTION PROCEEDINGS AFTER FEDERAL COURTS DENIED A STAY. HER PURPOSE WAS TO DEMONSTRATE HARASSMENT, THE LIKELIHOOD OF A CONTINUING CONSPIRACY BETWEEN APPELLEES AND THE ALAMEDA COUNTY JUDGES TO VIOLATE APPELLANT'S CONSTITUTIONAL RIGHTS, AND TO ALSO DEMONSTRATE WHY APPELLANT COULD NOT REALISTICALLY EXPECT TO OBTAIN ANY REDRESS IN STATE COURTS, TO WIT:

1). Order to Show Cause Re Contempt permitting service of contempt by mail.

2). Order issuing Bench Warrant on a mailed notice (continuing O/S/C to 1/11/88).

3). Order effectuating bench warrant establishing bail at "\$50,000.00 cash only" based on an order to pay only \$2,500 in sanctions.

4). Memo of points and authorities demonstrating clear impropriety of contempt/ bail requirements under California law.

5). Transcript of Order of Examination wherein Appellees' counsel procures Municipal Court judge to sentence Appellant to jail for invoking Fifth Amendment and refusing to answer questions related to her assets when contempt proceeding was actually pending and "ability to pay" was the element to be proved.

6). Dismissal of contempt by Superior Court.

In her Declaration Appellant also described what had occurred in Superior Court before Hon. Michael Ballachey relative to "void

judgment"...no transcript being yet available. She also indicated the matter (void judgment) was being appealed to the Fifth Division of the First Appellate Division of California District Court of Appeal and then explained at length why and how the past record of this division indicated that this Division would likewise be likely to fail to protect her rights.

FILED
OCT. 24, 1988
Cathy A. Catterson,
Clerk U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICIA M. BOURKE,)	
)	
Plaintiff/Appellant	)	No. 88-2446
)	
vs-	)	DC# CV-87-5134-JPV
	)	Northern California
JEANNE SCHUMAN, et al)	
	)	ORDER
Defendants/Appellees)	
)	

Appellant's Oct. 6, 1988 motion, her supplemental excerpts and the October 17, 1988 response are referred to the panel that will consider the merits of this appeal.

This order is subject to reconsideration by a judge if any objection is filed within ten (10) days of the entry of the order.

For the Court:

Cathy A. Catterson
Clerk of the Court

Cole Benson
Deputy Clerk

pro 10.17

Endorsed filed
By Ninth Circuit 12/7/89

UNITED STATES CIRCUIT COURT OF APPEAL
NINTH CIRCUIT

PATRICIA M. BOURKE,)	
)	
Appellant)	
)	
vs-	)	No. 88-2446
)	
	)	Dist. Ct. No.
	)	C-87-5134
JEANNE SCHUMAN,)	
WILLIAM GIBBS, et al)	
)	
Respondents.)	
)	

APPELLANT'S SUBMISSION OF ADDITIONAL CASES

APPEARANCES:

For Appellant:

Patricia M. Bourke
Attorney In Pro Per
P. O. Box 415
Walnut Creek, Ca.
94696

For Respondents:

William Gibbs
Attorney at Law
169 14th Street
Oakland, Ca. 94612

Ph: (415) 944-4718

Ph: (415) 893-2270

Caldeira v. County of Kauai (9th Cir. 1989)
866 F. 2d 1175.

A federal court reviews de novo a district court's ruling on the availability of res judicata both as to claim preclusion and issue preclusion. (p. 1177)

Federal courts must give the same full faith and credit to judicial proceedings of any state as those proceedings would enjoy under the laws of the state where the judgment was rendered. (p. 1177, p. 1178)

Where the various levels of state courts have affirmed an arbitration award, the federal district court must determine if those state proceedings (both the arbitration and the state court proceedings) provided the Appellant with a full and fair opportunity to litigate his claims. If neither the arbitrator nor the state courts addressed the federal claim(s) then federal intervention is appropriate. (p. 1178, 1179, 1180)

Redetermination of the issues in federal court is also appropriate if there is reason to doubt the quality, extensiveness, or fairness,

of procedures followed in prior litigation.
(p. 1180)

J. R. Norton Co. v. Agricultural Labor
Relations Board (1987) 192 CA 3d 890, 238 Cal
Rptr 87.

"The province of the (Labor Relations) Board is to resolve, not to find, issues. Where evidence is introduced on one issue set by the pleadings its introduction cannot be regarded as authorizing the determination of some other issue not presented by the pleadings." (p. 94)

A litigant must have an opportunity to gather evidence or prepare legal arguments refuting the events which form the basis for a judgment against him. Fundamental fairness includes both the right to adequate notice and the right to defend against charged violations. The lack of notice runs contrary to elementary constitutional principles of procedural due process and requires that any resulting judgment be set aside. (p. 94)

Gutierrez v. Bowen (S.D.N.Y. 1989) 702 F.
Supp. 1050, 1061

Res judicata should not be applied to an otherwise final judgment if substantive due

process is not met. It is not met where the judgment before the federal court is so clearly wrong as to amount to a display of arbitrary power, and not an exercise of judgment. The same test applies to state court judgment brought into federal district courts as to federal decisions.

P. Edward A. By and Through Nolan v. Williams
(1988) 696 F. Supp. 1432

Even if a state court proceeding is still pending in the state courts, and Younger v. Harris (1971) 401 US 37, 91 S. Ct. 746, 27 L. Ed. 2d 669, would therefore apply, the federal court should still intervene if there is a sufficient showing that the pending state action is motivated by a desire to harass or is conducted in bad faith. (p. 1435)

Likewise, federal courts ought not to abstain if the state court proceedings have not afforded an opportunity to raise the constitutional claims. (p. 1437)

F.E. Trotter, Inc. v. Watkins (9th Cir. 1989)
869 F. 2d 1312.

A defendant entitled to a qualified immunity when prosecuted under 42 U.S.C. 1983, loses his immunity if the unlawfulness of the challenged action was apparent. Immunity turns on the objective reasonableness of the conduct, not on a subjective showing of good faith. (p. 1315-1316)

A substantive due process claim requires proof that interference with property rights was irrational or arbitrary. (p. 1316)

There is no good faith immunity under section 1983 for private parties who act under color of state law to deprive an individual of his or her constitutional rights. (p. 1317-1318)

Respectfully submitted:

Patricia M. Bourke
Attorney In Pro Per

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
P. O. BOX 547
SAN FRANCISCO, CALIFORNIA 94101
April 19, 1989

In re: 88-3446 Patricia M. Bourke v. Jeanne Schuman

The United States Court of Appeals for the Ninth Circuit is considering submission of your case without argument. You have ten (10) days from the receipt of this letter to present a statement setting forth the reasons why oral argument should be heard in this case. Please send an original and three (3) copies of your statement to the Clerk's Office in San Francisco, and show proof of service to opposing counsel.

The court welcomes additional citations, without argument, of relevant decisions rendered since the filing of the party's last brief (see Rule 28(j) of FRAP). Send an original and three (3) legible copies to me, on letter size paper, with proof of service on all parties.

Very truly yours,

CATHY A. CATTERSON
Clerk of Court

By: Tom Hom
Deputy Clerk

cal/docs/screen34-4 (7/6/87)

FILED
Dec. 5, 1989
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PATRICIA M. BOURKE,)	
)	
Plaintiff/Appellant	)	No. 88-2446
)	
vs-	)	DC# CV-87-5134-JPV
	)	Northern California
JEANNE SCHUMAN, et al	)	(San Francisco)
)	
Defendants/Appellees	)	ORDER
)	

Before: WRIGHT, HUG, and LEAVY, Circuit
Judges

Appellant's motion to augment time for
presentation of oral argument is DENIED. Each
side is allotted 15 minutes per side for oral
argument.

42 U.S.C. 1983, et seq.

- 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

- 1985. Conspiracy to interfere with civil rights

Obstructing justice; intimidating party, witness, or juror

(2) ... if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire...for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purposes of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws;...if one or more persons engaged

therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured...or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

- 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action;...But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

- 1988. Proceedings in vindication of civil rights; attorney's fees

...In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

- 1343. Civil rights and elective franchise
The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any act of Congress providing for the protection of civil rights, including the right to vote.

AMENDMENT VIII-EXCESSIVE BAIL,
FINES,PUNISHMENTS

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV-CITIZENSHIP; PRIVILEGES AND
IMMUNITIES; DUE PROCESS; EQUAL PROTECTION;
APPORTIONMENT OF REPRESENTATION;
DISQUALIFICATION OF OFFICERS; PUBLIC DEBT;
ENFORCEMENT

Section 1. ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws....

FEDERAL RULES OF CIVIL PROCEDURE

Rule 60. Relief From Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (4) the judgment is void; ... (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time,.... This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding,...

...the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

§ 1141.23. Award; writing, signature and filing; entry in judgment book; force and effect

The arbitration award shall be in writing, signed by the arbitrator and filed in the court in which the action is pending. If there is no request for a de novo trial and the award is not vacated, the award shall be entered in the judgment book in the amount of the award. Such award shall have the same force and effect as a judgment in any civil action or proceeding, except that it is not subject to appeal and it may not be attacked or set aside except as provided by Section 1286.2 or Judicial Council rule.

473,

§ 1286.2. Grounds for vacation of award

Subject to Section 1286.4, the court shall vacate the award if the court determines that:

(a) The award was procured by corruption, fraud or other undue means;

(b) There was corruption in any of the arbitrators;

(c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator;

(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or

(e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title.

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 284. Change or substitution; consent; order of court

The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:

1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes;
2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other.

§ 285. Change or substitution: notice

When an attorney is changed, as provided in the last section, written notice of the change and of the substitution of a new attorney, or of the appearance of the party in person, must be given to the adverse party. Until then he must recognize the former attorney.

CALIFORNIA CIVIL CODE

§ 3336. Personal property; conversion; presumption

The detriment caused by the wrongful conversion of personal property is presumed to be:

First—The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and

Second—A fair compensation for the time and money properly expended in pursuit of the property.

RULES OF PROFESSIONAL CONDUCT

RULE 2-100. COMMUNICATION WITH A REPRESENTED PARTY

(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

RULE 4-100. PRESERVING IDENTITY OF FUNDS AND PROPERTY OF A CLIENT

(A) All funds received or held for the benefit of clients by a member or law firm, including advances for costs and expenses, shall be deposited in one or more identifiable bank accounts labelled "Trust Account," "Client's Funds Account" or words of similar import, maintained in the State of California, or, with written consent of the client, in any other jurisdiction where there is a substantial relationship between the client or the client's business and the other jurisdiction. No funds belonging to the member or the law firm shall be deposited therein or otherwise commingled therewith except as follows:

(1) Funds reasonably sufficient to pay bank charges.

(2) In the case of funds belonging in part to a client and in part presently or potentially to the member or the law firm, the portion belonging to the member or law firm must be withdrawn at the earliest reasonable time after the member's interest in that portion becomes fixed. However, when the right of the member or law firm to receive a portion of trust funds is disputed by the client, the disputed portion shall not be withdrawn until the dispute is finally resolved.

CALIFORNIA CIVIL CODE

§ 47. Privileged publication or broadcast

A privileged publication or broadcast is one made—

1. . . .

2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure; . . .

3. In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or (3) who is requested by the person interested to give the information.

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 340. One year

Within one year:

3. Libel, slander, assault, battery, false imprisonment, seduction, injury or death from wrongful act or neglect, forged or raised checks, injury to animals by feeder or veterinarian. An action for libel, slander, assault,

§ 1013. Service by mail; procedure; completion; extension of time for exercising right or performing act

(a) In case of service by mail, the notice or other paper must be deposited in a post office, mailbox, sub-post office, substation, or mail chute, or other like facility regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed to the person on whom it is to be served, at his office address as last given by him on any document which he has filed in the cause and served on the party making service by mail; otherwise at his place of residence. The service is complete at the time of the deposit, but if,...

§ 1014. Appearance defined; right to notices before and after appearance

A defendant appears in an action when he answers, demurs, files a notice of motion to strike, files a notice of motion to transfer pursuant to Section 396b, gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. Where a defendant has not appeared, service of notice or papers need not be made upon him.

§ 1015. Service; nonresident party; service on clerk or attorney

When a plaintiff or a defendant, who has appeared, resides out of the State, and has no attorney in the action or proceeding, the service may be made on the clerk or on the judge where there is no clerk, for him.

§ 1016. Service; process to bring party into contempt; inapplicability of certain sections

PRECEDING PROVISIONS NOT TO APPLY TO PROCEEDING TO BRING PARTY INTO CONTEMPT. The foregoing provisions of this Chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt.

CALIFORNIA CONSTITUTION, ART. I

§ 12. Bail; release; exception for certain crimes; excessive bail; recognizance

Sec. 12. A person shall be released on bail by sufficient sureties, except for:

(a) Capital crimes when the facts are evidence or the presumption great;

(b) Felony offenses involving acts of violence on another person when the facts are evident or the presumption great and the court finds based upon clear and convincing evidence that there is a substantial likelihood the person's release would result in great bodily harm to others; or

(c) Felony offenses when the facts are evident or the presumption great and the court finds based on clear and convincing evidence that the person has threatened another with great bodily harm and that there is a substantial likelihood that the person would carry out the threat if released.

Excessive bail may not be required. In fixing the amount of bail, the court shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case.

A person may be released on his or her own recognizance in the court's discretion.

RULES FOR JUDICIAL ARBITRATION

RULE 1613. RULES OF EVIDENCE AT HEARING

(a) All evidence shall be taken in the presence of the arbitrator and all parties, except where any of the parties has waived the right to be present or is absent after due notice of the hearing.

(b) The rules of evidence governing civil actions apply to the conduct of the arbitration hearing, except:

(1) Any party may offer written reports of any expert witness, medical records and bills (including physiotherapy, nursing, and prescription bills), documentary evidence of loss of income, property damage repair bills or estimates, police reports concerning an accident which gave rise to the case, other bills and invoices, purchase orders, checks, written contracts, and similar documents prepared and maintained in the ordinary course of business. The arbitrator shall receive them in evidence if copies have been delivered to all opposing parties at least 20 days prior to the hearing. Any other party may subpoena the author or custodian of the document as a witness and examine the witness as if under cross-examination. Any repair estimate offered as an exhibit, and the copies delivered to opposing parties, shall be accompanied (i) by a statement indicating whether or not the property was repaired, and, if it was, whether the estimated repairs were made in full or in part, and (ii) by a copy of the receipted bill showing the items of repair made and the amount paid. The arbitrator shall not consider any opinion as to ultimate fault expressed in a police report.

(2) The written statements of any other witness may be offered and shall be received in evidence if:

(i) they are made by affidavit or by declaration under penalty of perjury,

(ii) copies have been delivered to all opposing parties at least 20 days prior to the hearing, and

(iii) no opposing party has, at least 10 days before the hearing, delivered to the proponent of the evidence a written demand that the witness be produced in person to testify at the hearing.

The arbitrator shall disregard any portion of a statement received pursuant to this rule that would be inadmissible if the witness were testifying in person, but the inclusion of inadmissible matter does not render the entire statement inadmissible.

§ 1270. Release on own recognizance; authorization by court or magistrate; misdemeanors; right; exception

(a) Any person, who has been arrested for or charged with an offense other than a capital offense may be released on his or her own recognizance by a court or magistrate who could release a defendant from custody upon the defendant giving bail, including a defendant arrested upon an out-of-county warrant, provided that a defendant who is in custody and is arraigned on a complaint alleging an offense which is a misdemeanor, and a defendant who appears before a court or magistrate upon an out-of-county warrant arising out of a case involving only misdemeanors, shall be entitled to an own recognizance release unless the court makes a finding upon the record that an own recognizance release will not reasonably assure the appearance of the defendant as required. In such event the court shall then set bail and specify the conditions, if any, whereunder the defendant shall be released.

(b) The provisions of Article 9 (commencing with Section 1318) shall apply to any person who is released pursuant to this section.

§ 1275. Amount of bail; considerations; rejection of bail bond given for consideration, etc., feloniously obtained

In fixing the amount of bail, the judge or magistrate shall take into consideration the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his appearing at the trial or hearing of the case. No bail bond shall be accepted unless the judge or magistrate be convinced that no portion of the consideration, pledge, security, deposit, or indemnification paid, given, made, or promised for its execution was feloniously obtained by the defendant.

